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1822 East Mall
University of British Columbia
Vancouver, British Columbia
Canada V6T 1Z1
Voice: (604) 822 0142
Fax: (604) 822 0144
E-mail: bcli@bcli.org
Website: <http://www.bcli.org>

Consultation Paper on Complex Stratas

Prepared by the
Strata Property Law
(Phase Two) Project
Committee

August 2016

Supported By:



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British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: bcli@bcli.org

WWW: <http://www.bcli.org>

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The Strata Property Law (Phase Two) Project Committee was formed in fall 2013. This volunteer project committee is made up of leading experts in strata-property law and practice in British Columbia. The committee's mandate is to assist BCLI in developing recommendations to reform strata-property law in the seven areas selected for study in this phase-two project. These recommendations will be set out in final reports for each area. The project as a whole will complete in December 2017.

The members of the committee are:

Patrick Williams—chair
(Partner, Clark Wilson LLP)

Veronica Barlee (Jul. 2014–present)
(Senior Policy Advisor, Housing Policy Branch, Ministry of Natural Gas Development and Responsible for Housing)

Larry Buttress (Oct. 2013–Jun. 2016)
(Deputy Executive Officer, Real Estate Council of British Columbia)

Garth Cambrey
(Real Estate Institute of British Columbia)

Tony Gioventu
(Executive Director, Condominium Home Owners Association)

Tim Jowett
(Senior Manager, E-Business and Deputy Registrar, Land Title and Survey Authority)

Alex Longson (Jul. 2016–present)
(Senior Compliance Officer, Real Estate Council of British Columbia)

Judith Matheson
(Realtor, Coldwell Banker Premier Realty)

Elaine McCormack
(Partner, Wilson McCormack Law Group)

Doug Page (Oct. 2013–Jul. 2014)
(Director of Legislation, Housing Policy Branch, Ministry of Natural Gas Development and Responsible for Housing)

David Parkin
(Assistant City Surveyor, City of Vancouver)

Allen Regan
(Vice-President, Bayside Property Services Ltd.)

Stanley Rule
(Lawyer, Sabey Rule LLP)

Sandy Wagner
(President of the Board of Directors, Vancouver Island Strata Owners Association)

Ed Wilson
(Partner, Lawson Lundell LLP)

Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

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Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. General comments on reform on complex stratas are also welcome—specifically, legal issues relating to sections, types, and phases.

The best way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at <http://www.bcli.org/project/strata-property-law-phase-two>. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in one of four ways—

by mail: British Columbia Law Institute
 1822 East Mall
 University of British Columbia
 Vancouver, BC V6T 1Z1
 Attention: Kevin Zakreski

by fax: (604) 822-0144

by email: strata@bcli.org

by online survey: link from www.bcli.org/project/strata-property-law-phase-two

If you want your response to be considered by us as we prepare our report on complex stratas, then we must receive it by **15 January 2017**.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	xix
CHAPTER 1. INTRODUCTION	1
Overview	1
About the Strata Property Law Project—Phase Two	2
The phase-two project’s supporters	2
The Strata Property Law (Phase Two) Project Committee	3
What are complex stratas?	4
The structure of this consultation paper	5
How to have your say	5
CHAPTER 2. STRATA-PROPERTY BASICS AND THE COST-SHARING PROBLEM	7
Introduction	7
The essential elements of a strata property	7
The three generations of strata-property legislation	8
Introduction	8
Strata Titles Act 1966–74	8
Strata Titles Act/Condominium Act 1974–2000	8
Strata Property Act 2000–present	9
The owner-developer	10
Creation of a strata property by deposit of a strata plan	10
Strata lots	11
Common property, limited common property, and common assets	12
The strata corporation	13
The fundamentals of strata-corporation governance	14
Bylaws and rules	14
General meetings	15
The strata council	17
Budgets and funds	18
A typical year for a strata corporation	18
Common expenses	19
Unit entitlement	20
What is unit entitlement and how is it used?	20
How is unit entitlement determined?	21
When is unit entitlement determined and where is it found?	22
The cost-sharing challenge	22
Introduction: Three problems for complex stratas	22
The general rule for sharing common expenses	23
Unfairness, the general rule, and the three subjects of this consultation paper	24

Consultation Paper on Complex Stratas

Changing the general rule: using something other than unit entitlement as a basis for cost sharing.....	26
Air-space parcels: another approach to cost sharing	27
CHAPTER 3. SECTIONS.....	29
Background.....	29
Introduction	29
The legislative purpose of sections.....	29
Historical development of provisions on sections	30
Strata Titles Act 1966.....	30
Strata Titles Act 1974.....	30
Strata Titles Amendment Act 1977	32
Condominium Act	33
Strata Property Act.....	33
Initial impressions.....	33
Qualifying conditions	34
Creation.....	35
Introduction.....	35
Sections created by the owner-developer	35
Sections created by the strata corporation.....	36
Sections created by court order	36
Powers and duties	38
Governance.....	39
Administration.....	39
Bylaws and rules.....	40
Finances	41
Cancellation	42
Sections and their equivalents in other jurisdictions	42
Introduction	42
Saskatchewan	42
Other Canadian jurisdictions	46
Other Canadian reform projects.....	46
United States of America.....	47
Australia.....	48
Tasmania and the Australian Capital Territory.....	48
Victoria.....	50
Reform proposals in other Australian jurisdictions.....	51
Issues for Reform—General	53
Introduction	53
Should the Strata Property Act continue to contain provisions enabling the creation and operation of sections?	53
Brief description of the issue	53
Discussion of options for reform.....	53
The committee’s tentative recommendation for reform	57
Issues for Reform—Qualifying Conditions	58

Consultation Paper on Complex Stratas

Should the Strata Property Act continue to require stratas to meet qualifying conditions to create sections?.....	58
Brief description of the issue	58
Discussion of options for reform.....	58
The committee’s tentative recommendation for reform	59
Issues for Reform—Creation.....	60
Should the Strata Property Act continue to allow an owner-developer to create sections?	60
Brief description of the issue	60
Discussion of options for reform.....	61
The committee’s tentative recommendation for reform	62
Should the Strata Property Act provide that, if an owner-developer creates sections, then a special mechanism should allow the sections to be cancelled early in their existence?	63
Brief description of the issue	63
Discussion of options for reform.....	63
The committee’s tentative recommendation for reform	63
Should the Strata Property Act require that, when a section is created by a strata corporation, the bylaws must set out the date of the section’s first annual general meeting?	64
Brief description of the issue	64
Discussion of options for reform.....	65
The committee’s tentative recommendation for reform	65
Should the Strata Property Act require that the creation or cancellation of sections by a strata corporation be approved by a resolution passed by a 3/4 vote in all cases?.....	66
Brief description of the issue	66
Discussion of options for reform.....	66
The committee’s tentative recommendation for reform	67
Should new forms be prescribed for the creation, amendment, and cancellation of a section?	67
Brief description of the issue	67
Discussion of options for reform.....	67
The committee’s tentative recommendation for reform	68
Should the Strata Property Act provide for the categorization of filings concerning the creation, amendment, and cancellation of sections in the strata corporation’s general index?	68
Brief description of the issue	68
Discussion of options for reform.....	69
The committee’s tentative recommendation for reform	69
Issues for Reform—Powers and Duties	70
Should the Strata Property Act give sections authority over common property?	70
Brief description of the issue	70
Discussion of options for reform.....	70

Consultation Paper on Complex Stratas

The committee’s tentative recommendation for reform	72
Should the Strata Property Act give sections authority over common assets and strata lots?	73
Brief description of the issue	73
Discussion of options for reform.....	73
The committee’s tentative recommendation for reform	74
Should sections retain the power to enforce bylaws and rules?.....	74
Brief description of the issue	74
Discussion of options for reform.....	74
The committee’s tentative recommendation for reform	75
Should sections be given enhanced power to obtain insurance?	75
Brief description of the issue	75
Discussion of options for reform.....	76
The committee’s tentative recommendation for reform	76
Should the Strata Property Act expressly permit a mortgagee to give a Mortgagee’s Request for Notification to a section?	76
Brief description of the issue	76
Discussion of options for reform.....	77
The committee’s tentative recommendation for reform	77
Should the Strata Property Act require sections to file their mailing addresses in the land title office?	77
Brief description of the issue	77
Discussion of options for reform.....	78
The committee’s tentative recommendation for reform	78
Issues for Reform—Governance.....	78
Should the Strata Property Act contain an express declaration that the act applies to sections?.....	78
Brief description of the issue	78
Discussion of options for reform.....	79
The committee’s tentative recommendation for reform	79
Should the Strata Property Act require sections to provide an information certificate?	80
Brief description of the issue	80
Discussion of options for reform.....	80
The committee’s tentative recommendation for reform	81
Should the information certificate be modified to address whether a strata corporation has sections?.....	82
Brief description of the issue	82
Discussion of options for reform.....	82
The committee’s tentative recommendation for reform	82
Should the Strata Property Act require sections to provide certificate-of-payment information to a strata corporation?.....	83
Brief description of the issue	83
Discussion of options for reform.....	83
The committee’s tentative recommendations for reform	84

Consultation Paper on Complex Stratas

Issues for Reform—Finances	85
Should the Strata Property Act allow sections to register a lien against a section owner’s strata lot if the section owner fails to make certain prescribed payments?	85
Brief description of the issue	85
Discussion of options for reform	86
The committee’s tentative recommendation for reform	87
Should a strata corporation’s lien rank in priority to a section’s lien?	87
Brief description of the issue	87
Discussion of options for reform	88
The committee’s tentative recommendation for reform	89
Should a section’s lien rank in priority to every other lien and registered charge?	89
Brief description of the issue	89
Discussion of options for reform	89
The committee’s tentative recommendation for reform	90
Should a section and a strata corporation be required to give notice to each other of money owing to the section or strata corporation before registering a lien against the owner’s strata lot?	90
Brief description of the issue	90
Discussion of options for reform	91
The committee’s tentative recommendation for reform	91
Should the Strata Property Act be consequentially amended to expressly acknowledge the power of a section to file a lien under section 116?	91
Brief description of the issue	91
Discussion of options for reform	91
The committee’s tentative recommendation for reform	92
Should the Strata Property Act require strata corporations with sections to have separate budgets?	92
Brief description of the issue	92
Discussion of options for reform	93
The committee’s tentative recommendation for reform	94
Should the Strata Property Act require separate accounting for section funds?	94
Brief description of the issue	94
Discussion of options for reform	95
The committee’s tentative recommendation for reform	95
Should the Strata Property Act clarify that bylaws for the creation and administration of sections provide only for the administration of expenses that relate solely to the section?	96
Brief description of the issue	96
Discussion of options for reform	96
The committee’s tentative recommendation for reform	97
Issues for Reform—Cancellation	97

Consultation Paper on Complex Stratas

Should the Strata Property Act require that a resolution to cancel a section be approved by a sectional 3/4 vote in every other section of the strata corporation?	97
Brief description of the issue	97
Discussion of options for reform.....	98
The committee's tentative recommendation for reform	99
Should the Strata Property Regulation require that a resolution to amend a strata corporation's bylaws to cancel a section address issues arising as a consequence of cancelling a section?	100
Brief description of the issue	100
Discussion of options for reform.....	101
The committee's tentative recommendation for reform	104
CHAPTER 4. TYPES	107
Background.....	107
Introduction	107
The purpose of types and how they differ from sections.....	107
Legislative history	109
Introduction	109
1966 Strata Titles Act.....	109
1974–2000: Strata Titles Act to Condominium Act	109
Strata Property Act	111
Initial impressions.....	111
Legislative enabling provision or definition	112
Creation.....	113
Sharing operating expenses	113
Sharing capital expenses.....	115
Powers, duties, and governance	116
Cancellation	117
Issues for Reform	117
Introduction	117
Issues for Reform—Legislative Enabling Provision or Definition	118
Should the Strata Property Act contain a provision expressly enabling the creation of types of strata lots?	118
Brief description of the issue	118
Discussion of options for reform.....	118
The committee's tentative recommendation for reform	119
Issues for Reform—Creation.....	119
Should the Strata Property Act require a strata corporation that wishes to create types of strata lots to obtain approval of this decision at a general meeting by adoption of resolutions passed by 3/4 votes of both eligible voters in the type and all eligible voters in the strata corporation?	119
Brief description of the issue	119
Discussion of options for reform.....	120
The committee's tentative recommendations for reform.....	120

Consultation Paper on Complex Stratas

Should the Strata Property Act allow an owner-developer to create types of strata lots at the time the strata plan is deposited in the land title office?	121
Brief description of the issue	121
Discussion of options for reform	121
The committee's tentative recommendation for reform	122
Issues for Reform—Sharing Operating Expenses	122
Should the Strata Property Regulation allow operating expenses (expenses that usually occur either once a year or more often than once a year) to be shared by types of strata lots?	122
Brief description of the issue	122
Discussion of options for reform	122
The committee's tentative recommendation for reform	123
Should the Strata Property Regulation allow operating expenses (expenses that usually occur once a year or more often than once a year) to be shared by types of strata lots, even if the expense is in relation to an item that does not exclusively benefit the type?	123
Brief description of the issue	123
Discussion of options for reform	123
The committee's tentative recommendation for reform	124
Should the Strata Property Act require a strata corporation with types to have a year-end reconciliation of expenses allocated to a type?	124
Brief description of the issue	124
Discussion of options for reform	125
The committee's tentative recommendation for reform	125
Issues for Reform—Sharing Capital Expenses	126
Should the Strata Property Regulation allow capital expenses (expenses that occur less frequently than once a year) to be shared by types of strata lots, if the expense is in relation to an item that exclusively benefits the type?	126
Brief description of the issue	126
Discussion of options for reform	126
The committee's tentative recommendation for reform	127
Should the Strata Property Act allow a type to have a contingency reserve fund?	128
Brief description of the issue	128
Discussion of options for reform	129
The committee's tentative recommendation for reform	129
Should the Strata Property Regulation allow capital expenses (expenses that usually occur less frequently than once a year) to be shared by types of strata lots, even if the expense is in relation to an item that does not exclusively benefit the type?	130
Brief description of the issue	130
Discussion of options for reform	130
The committee's tentative recommendation for reform	130
Issues for Reform—Powers, Duties, and Governance	131

Consultation Paper on Complex Stratas

Should the Strata Property Act give types authority over common property, common assets, and strata lots?	131
Brief description of the issue	131
Discussion of options for reform.....	131
The committee’s tentative recommendation for reform	132
Should the Strata Property Act require types to have an executive?.....	132
Brief description of the issue	132
Discussion of options for reform.....	132
The committee’s tentative recommendation for reform	133
Issues for Reform—Cancellation.....	133
Should the Strata Property Act require a strata corporation that wishes to cancel types of strata lots to obtain approval of this decision at a general meeting by adoption of resolutions passed by 3/4 votes of both eligible voters in the type and all eligible voters in the strata corporation?	133
Brief description of the issue	133
Discussion of options for reform.....	133
The committee’s tentative recommendation for reform	134
CHAPTER 5. PHASES.....	135
Background.....	135
Overview	135
Meaning of “phase”	136
Policy goals of phases	136
Advantages and disadvantages of phases.....	137
History of phasing in British Columbia strata-property legislation	139
1966 Strata Titles Act.....	139
1974–2000 Strata Titles Act to Condominium Act.....	139
Phases under the Strata Property Act	141
Introduction	141
Applying to deposit a phased strata plan.....	141
Introduction	141
Phased Strata Plan Declaration.....	142
Approval by an approving officer of a phased strata plan	143
Changing circumstances—amending the Phased Strata Plan Declaration	145
Introduction	145
Extending the time to make an election to proceed.....	145
Electing not to proceed.....	146
Other amendments to the declaration	148
Governance and phased strata plans	149
Introduction	149
Owner-developer’s responsibilities.....	149
Annual general meeting after deposit of subsequent phase	152
Budgets and finances in a phased strata plan.....	153
Protecting the financial interests of owners in a phased strata plan.....	155
Introduction	155

Consultation Paper on Complex Stratas

Security for common facilities.....	156
The owner-developer’s contribution to common expenses.....	159
Cost sharing and phases.....	160
Phases in other jurisdictions	162
Canada	162
Alberta and Saskatchewan.....	162
Manitoba and Ontario	163
Atlantic provinces.....	165
Territories and Québec.....	166
Australia	166
Issues for Reform	171
Introduction	171
Issues for Reform—General	171
Should the Strata Property Act continue to enable the development of strata properties in phases?	171
Brief description of the issue	171
Discussion of options for reform.....	172
The committee’s tentative recommendation for reform	173
Issues for Reform—Applying to Deposit a Phased Strata Plan.....	173
Should the Strata Property Act continue to require an owner-developer to prepare and file a Phased Strata Plan Declaration?	173
Brief description of the issue	173
Discussion of options for reform.....	173
The committee’s tentative recommendation for reform	174
Should the Strata Property Act continue to require an owner-developer to obtain the approval of an approving officer to a phased strata plan?.....	174
Brief description of the issue	174
Discussion of options for reform.....	175
The committee’s tentative recommendation for reform	175
Should approval of a Phased Strata Plan Declaration expire after one year? ..	176
Brief description of the issue	176
Discussion of options for reform.....	176
The committee’s tentative recommendation for reform	178
Should the application of section 510 of the Local Government Act to a phased strata plan be clarified?	178
Brief description of the issue	178
Discussion of options for reform.....	178
The committee’s tentative recommendation for reform	179
Issues for Reform—Changing Circumstances	179
Should the Strata Property Act allow an interested person to apply for an injunction to complete a phased strata in accordance with a Phased Strata Plan Declaration?	179
Brief description of the issue	179
Discussion of options for reform.....	180
The committee’s tentative recommendation for reform	181

Consultation Paper on Complex Stratas

Should the Strata Property Act require an owner-developer to obtain the consent of the affected strata corporation to any amendments to the Phased Strata Plan Declaration?	182
Brief description of the issue	182
Discussion of options for reform.....	182
The committee’s tentative recommendations for reform.....	183
Should the Strata Property Act allow a strata corporation to apply to the supreme court for a declaration that the owner-developer be deemed to have elected not to proceed even if no order that the owner-developer complete the phase by a set date has been made?	184
Brief description of the issue	184
Discussion of options for reform.....	185
The committee’s tentative recommendation for reform	186
Should section 232 of the Strata Property Act continue to require approval by an approving officer of an amendment to the declaration to extend time for an election to proceed?	186
Brief description of the issue	186
Discussion of options for reform.....	186
The committee’s tentative recommendation for reform	187
Issues for Reform—Governance and Phased Strata Plans.....	188
Should the Strata Property Act enable a regulation that expressly sets out the owner-developer’s governance obligations upon the deposit of a phase?188	
Brief description of the issue	188
Discussion of options for reform.....	189
The committee’s tentative recommendation for reform	189
Should the Strata Property Act continue to require a strata corporation to hold an annual general meeting after the deposit of each phase in a phased strata plan other than the first phase?	190
Brief description of the issue	190
Discussion of options for reform.....	190
The committee’s tentative recommendation for reform	194
Should the Strata Property Regulation require the election of two additional council members from the owners of a new phase at the general meeting that must be held after the deposit of a subsequent phase in the land title office?	195
Brief description of the issue	195
Discussion of options for reform.....	195
The committee’s tentative recommendation for reform	197
Should an owner-developer be required to turn over to the strata corporation the records listed in section 20 (2) (a) of the Strata Property Act for a new phase by no later than a set period following the deposit of that phase in the land title office?	198
Brief description of the issue	198
Discussion of options for reform.....	198
The committee’s tentative recommendation for reform	199

Consultation Paper on Complex Stratas

Should the Strata Property Regulation restrict a phased strata’s ability to amend bylaws relating to pets, rentals, age, and marketing?	199
Brief description of the issue	199
Discussion of options for reform	200
The committee’s tentative recommendation for reform	202
Should an owner-developer be required to identify how it intends to designate parking and storage lockers on the Phased Strata Plan Disclosure form? 203	
Brief description of the issue	203
Discussion of options for reform	203
The committee’s tentative recommendation for reform	204
Issues for Reform—Protecting the Financial Interests of Owners in a Phased Strata Plan	205
Should the Strata Property Regulation continue to require the owner-developer, after the deposit of a phase subsequent to the first phase, to prepare an interim budget for the entire strata corporation?	205
Brief description of the issue	205
Discussion of options for reform	206
The committee’s tentative recommendation for reform	209
Should the Strata Property Regulation be amended to require a strata corporation to account separately for the revenue and expenses during the interim-budget period after deposit of a phase subsequent to the first phase in the land title office?	210
Brief description of the issue	210
Discussion of options for reform	210
The committee’s tentative recommendation for reform	211
Should the Strata Property Act continue to require approval by an approving officer of security for common facilities?	211
Brief description of the issue	211
Discussion of options for reform	212
The committee’s tentative recommendation for reform	212
Should the Strata Property Act be amended to give an approving officer powers to charge a fee for approval of a Phased Strata Plan Declaration and to call for a verified estimate of the cost to construct common facilities?	213
Brief description of the issue	213
Discussion of options for reform	213
The committee’s tentative recommendation for reform	213
Should an owner-developer be required to ensure that the term of any insurance policy entered into by or on behalf of a phase subsequent to the first phase in a phased strata plan continues for at least four weeks after the new phase is deposited in the land title office?	214
Brief description of the issue	214
Discussion of options for reform	215
The committee’s tentative recommendation for reform	216
Should the Strata Property Act provide that the owner-developer be considered to have an insurable interest in any property insured under an insurance	

Consultation Paper on Complex Stratas

policy that continues in effect for at least four weeks after the new phase is deposited in the land title office?	217
Brief description of the issue	217
Discussion of options for reform.....	217
The committee's tentative recommendation for reform	217
Should the Strata Property Act provide for payment of funds to an insurance trustee under an insurance policy that continues in effect for at least four weeks after the new phase is deposited in the land title office?	218
Brief description of the issue	218
Discussion of options for reform.....	218
The committee's tentative recommendation for reform	218
Should the Strata Property Act require an owner-developer to give a strata corporation for a phased strata plan an insurance appraisal for the full replacement value of a new phase no later than 14 days before the deposit of the new phase in the land title office?.....	219
Brief description of the issue	219
Discussion of options for reform.....	219
The committee's tentative recommendation for reform	219
CHAPTER 6. CONCLUSION	221
APPENDIX A—LIST OF TENTATIVE RECOMMENDATIONS.....	223
APPENDIX B—SUMMARY CONSULTATION	233
APPENDIX C—BIOGRAPHIES OF PROJECT-COMMITTEE MEMBERS.....	251
PRINCIPAL FUNDERS IN 2015.....	259

EXECUTIVE SUMMARY

Introduction

The British Columbia Law Institute began work on the Strata Property Law Project—Phase Two in summer 2013. The phase-two project builds on the consultation and research carried out in phase one of the project. It addresses legislative reform of the *Strata Property Act*. With the goal of promoting the development of the next generation of the act, the project’s purpose is to make recommendations in the following seven areas: (1) fundamental changes to a strata; (2) complex stratas; (3) selected governance issues; (4) common property; (5) selected land-title issues; (6) selected insurance issues; (7) leasehold stratas.

This consultation paper is the second published during the project. It deals with three legal devices for addressing the concerns raised by complex stratas: (1) sections, which allow for the creation of mini strata corporations; (2) types, which allow for the allocation, to specific strata lots, of expenses paid for out of a strata corporation’s operating fund; and (3) phases, which allow for the development of strata properties in segments over an extended period of time.

The consultation paper contains 68 proposals for reform of the *Strata Property Act* and the *Strata Property Regulation*. Readers may give their views on these proposals by a variety of means—filling out all or part of a response booklet, sending a letter to BCLI, or completing an online survey. BCLI will consider all responses in crafting its final recommendations for reform. For a response to be considered in this process, BCLI must receive it by **15 January 2017**.

Summary and full consultations

There are two versions of the consultation paper available for public comment.

A summary consultation sets out highlights from the full slate of proposals made on complex stratas. It contains little in the way of background information and no citation of sources. The summary consultation is located in appendix B to the consultation paper. A freestanding copy may be downloaded from <http://www.bcli.org>.

The full consultation paper contains all 68 proposals made on reforming complex stratas. It also provides the detailed research that was relied on in making those proposals.

The remainder of this executive summary describes only the full consultation.

Our supporters

The Strata Property Law Project—Phase Two has been made possible by project funding from the Real Estate Foundation of British Columbia, the Notary Foundation of British Columbia, the Ministry of Natural Gas Development and Responsible for Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

The Strata Property Law (Phase Two) Project Committee

BCLI is carrying out the Strata Property Law Project—Phase Two with the assistance of a volunteer project committee. The members of the project committee are:

Patrick Williams—chair
(Partner, Clark Wilson LLP)

Veronica Barlee (Jul. 2014–present)
(Senior Policy Advisor, Housing Policy Branch, Ministry of Natural Gas Development and Responsible for Housing)

Larry Buttress (Oct. 2013–Jun. 2016)
(Deputy Executive Officer, Real Estate Council of British Columbia)

Garth Cambrey
(Real Estate Institute of British Columbia)

Tony Gioventu
(Executive Director, Condominium Home Owners Association)

Tim Jowett
(Senior Manager, E-Business and Deputy Registrar, Land Title and Survey Authority)

Alex Longson (Jul. 2016–present)
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Stanley Rule
(Lawyer, Sabey Rule LLP)

Sandy Wagner
*(President of the Board of Directors,
Vancouver Island Strata Owners Association)*

Ed Wilson
(Partner, Lawson Lundell LLP)

Content of the consultation paper

Introduction

The consultation paper contains six chapters (including its brief concluding and introductory chapters). The introductory chapter gives an overview of the project and the consultation process. Then it discusses what the committee means by *complex strata*.

Complex strata isn't a legal term. It isn't found in the *Strata Property Act* or the *Strata Property Regulation*. Instead, it's a descriptive term that came out of the consultations BCLI held for phase one of the project.

The term is meant to capture two trends in the real-estate sector. One is combining two or more different uses in a single strata property. The resulting mixed-use strata may be used for, for example, a combination of residential, commercial, office, industrial, recreational, or hotel uses. The second involves the construction of larger residential developments, embracing a number of architectural styles and amenities.

These two trends give rise to a host of legal issues. The bulk of the consultation paper is concerned with three tools that the act uses to manage these legal issues: sections, types, and phases. But before delving into sections, types, and phases, the consultation paper provides a brief review of strata-property law.

Strata-property basics and the cost-sharing problem

This chapter is meant for readers who are new to strata-property law. It introduces the law's special terms and basic concepts.

The chapter also discusses in general terms the cost-sharing problem, which is at the heart of much of the committee's proposals relating to sections and types. As a general rule, strata-lot owners are "all in it together": that is, they share all common expenses by reference to a formula based on their strata lots' unit entitlements. This general rule can cause problems when a strata property has a number of different uses or different architectural characteristics. In these cases, some owners may ben-

enefit exclusively from a good or a service that is still considered a common expense. But according to the general rule all the owners share the expense, even those owners who derive no benefit from it. Sections and types each provide a means to shift the expense onto just those owners who benefit from it.

Sections

Strata corporations can also have sections. Sections are essentially mini strata corporations. The act allows an owner-developer or a strata corporation to create sections only if they represent the different interests of (1) owners of residential strata lots and owners of nonresidential strata lots, (2) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or (3) owners of different types of residential strata lots (with *types* meaning here apartment-style strata lots, townhouse-style strata lots, or detached houses). In addition to being part of the strata corporation, strata lots can also belong to sections. Because they have a separate legal status from a strata corporation, sections allow for some enhanced cost sharing and control of property. But this separate legal status also creates some operational and administrative issues, which can create pose challenges for owners, strata-council members, and strata-property managers.

The committee has made 29 tentative recommendations on sections, addressing issues in the seven areas. Highlights include:

- **General.** The committee is proposing that sections remain a part of strata-property law in British Columbia, despite the operational and administrative challenges. To address these issues, the committee proposes specific, incremental reforms to the law governing sections.
- **Qualifying conditions.** The committee proposes retaining the qualifying conditions for creating sections currently found in the act.
- **Creation.** The committee proposes retaining the owner-developer's power to create sections, but it couples this proposal with a tentative recommendation to give a strata corporation a mechanism to cancel those sections at the second annual general meeting.
- **Powers and duties.** The committee proposes spelling out powers and duties implied in the legislation. The committee also proposes enhancing the power of a section to obtain insurance.
- **Governance.** The committee proposes giving sections the express power to issue an Information Certificate (Form B).

- **Finances.** The committee proposes giving sections the express power to file a lien against a strata lot. The committee also proposes clarifying rules on section budgets and finances.
- **Cancellation.** The committee proposes that a resolution to cancel a section must address the legal issues that arise as a consequence of dissolving a mini corporation.

Types

A strata corporation may identify types of strata lots in its bylaws. While the act gives no guidance on how to do this, case law indicates that any principled distinction between types of strata lots will be valid. In practice, types tend to involve different architectural characteristics or different uses.

If a strata corporation's or section's bylaws have identified types, then the strata corporation or section may allocate specific operating expenses to the owners of a type of strata lot who exclusively benefit from the goods or services that generate the expense. Types, like sections, are a means to address the cost-sharing problem. But unlike sections types can't be used to allocate capital expenses. And in a further contrast to sections types aren't considered distinct legal entities. Because types are simpler, with more limited authority, they do not have the same administrative complexities as sections.

The committee has made 14 tentative recommendations on types, addressing issues in six areas. Highlights include:

- **Legislative enabling provision or definition.** The committee proposes that the act expressly enable the creation of types.
- **Creation.** The committee proposes establishing a clear procedure to create types, modelled on the procedure the act uses for creating a section.
- **Sharing operating expenses.** The committee proposes retaining the power to allocate operating expenses by type. The committee also proposes requiring a year-end reconciliation of expenses allocated to a type.
- **Sharing capital expenses.** The committee considered but declined to endorse a proposal to expand the scope of types by allowing them to be used to allocate capital expenses.
- **Powers, duties, and governance.** The committee considered but declined to endorse assigning additional powers and creating a formal governance structure for types.

- **Cancellation.** The committee proposes creating a legislative procedure to cancel a type, modelled on the procedure the act uses for cancelling a section.

Phases

Unlike sections and types, phases aren't used to address the cost-sharing problem. But like sections and types phases do have an economic rationale.

Phasing legislation allows an owner-developer to develop a strata property in segments. The legislation expands the pool of owner-developers who can take on and complete large-scale, sophisticated strata properties. This benefits strata-lot purchasers, who are given increased competition and choice in the marketplace. Strata-lot owners also benefit from economies of scale, which allow for greater amenities in a phased strata property.

Phasing legislation has its downsides. It is extraordinarily complex. It also requires that owner-developers and strata-lot owners have a longer-than-usual relationship with one another, where each party has separate interests. This poses challenges for the ordinary rules of strata-corporation governance and finances.

The committee has made 25 tentative recommendations on phases, addressing issues in five areas. Highlights include:

- **General.** The committee proposes retaining the legislative framework for phased strata plans.
- **Applying to deposit a phased strata plan.** The committee proposes retaining the current oversight mechanism for phased strata plans, which involves approval by an approving officer. If an approving officer grants approval, the committee proposes extending its duration from one year to two.
- **Changing circumstances.** The committee proposes fine tuning the approving officer's role in approving changes to a Phased Strata Plan Declaration.
- **Governance and phased strata plans.** The committee proposes simplifying the governance structure for new phases in a phased strata plan.
- **Protecting the financial interests of owners in a phased strata plan.** The committee proposes rolling back the scope of an interim budget that is required after the deposit of a new phase. The committee also proposes strengthening the approving officer's powers to review and approve security arrangements for common facilities.

Conclusion

The committee encourages responses to its proposals. Public comments will be fully considered by the committee, as they play an important part in the process of crafting this project's final recommendations. Those final recommendations will be submitted to the provincial government. The province of British Columbia regularly updates strata legislation.

CHAPTER 1. INTRODUCTION

Overview

Strata-property legislation was originally conceived as a means to encourage the development of residential housing. But nothing in British Columbia's three generations of strata-property acts has ever restricted the legislation to that one kind of development. Like other jurisdictions, since the 1960s there has been a rapid increase in strata properties that are used for industrial, commercial, office, and recreational purposes. In addition to the familiar condominiums, there are also strata-titled townhouses, even single family homes in strata subdivisions (bare-land strata developments). There has also been a proliferation of mixed-use stratas, which combine two or more of these purposes within a single strata property.

The ever-growing diversity and sophistication of strata-property developments has brought many benefits to British Columbia's real-estate sector. But there have been drawbacks too. The interests of residential and nonresidential strata-lot owners can sometimes be in conflict, particularly over the sharing of common expenses and the control of common property. Legislation and regulations have been developed to manage these issues and to facilitate ever-more-sophisticated strata properties.

This consultation paper examines options for reforming the rules applicable to complex stratas. Its focus is on three devices found in the *Strata Property Act*¹ and the *Strata Property Regulation*² and used in connection with complex stratas: (1) sections, which allow for the creation of mini strata corporations; (2) types, which allow for the allocation, to specific strata lots, of expenses paid for out of a strata corporation's operating fund; and (3) phases, which allow for the development of strata properties in segments over an extended period of time.

The consultation paper sets out tentative recommendations for reform of the law in relation to these three topics, for readers to review and to provide their comments. The consultation is open until **15 January 2017**.

After the consultation period closes, responses to the consultation paper will be taken into account in preparing a report that will contain the final recommendations on complex stratas. BCLI projects publishing this report in winter or spring 2017.

1. SBC 1998, c 43.

2. BC Reg 43/2000.

About the Strata Property Law Project—Phase Two

This *Consultation Paper on Complex Stratas* is part of the British Columbia Law Institute's ongoing Strata Property Law Project—Phase Two. BCLI began the Strata Property Law Project—Phase Two in summer 2013. The project's goals are to study seven areas of strata-property law, identify issues calling for reform of the law, and recommend changes to the *Strata Property Act* to address those issues.

The phase-two project builds on BCLI's Strata Property Law Project—Phase One, which was completed in 2012. Over the course of the phase-one project, BCLI carried out initial legal research and focussed consultation with leading experts in the strata-property field. The results of this research and consultation were published in BCLI's *Report on Strata Property Law: Phase One*,³ which recommended that BCLI undertake a law-reform project to examine the following subjects: (1) fundamental changes to a strata; (2) complex stratas; (3) selected governance issues; (4) common property; (5) selected land-title issues; (6) selected insurance issues; (7) leasehold stratas.

The first subject in the phase-two project was addressed in the project's first two publications, the *Consultation Paper on Terminating a Strata*⁴ and the *Report on Terminating a Strata*.⁵ The Legislative Assembly of British Columbia implemented this report's recommendations in fall 2015.⁶

While the consultation on complex stratas is underway, work on the next three subjects (governance, common property, land-title issues) is planned to begin, with a publication addressing those subjects projected for 2017.

The phase-two project's supporters

The Strata Property Law Project—Phase Two has been made possible by project grants from the Real Estate Foundation of British Columbia, the Notary Foundation

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3. BCLI rep no 70 (Vancouver: The Institute, 2012), online: <www.bcli.org/project/strata-property-law-phase-one>.
 4. (Vancouver: The Institute, 2014), online: <www.bcli.org/wordpress/wp-content/uploads/2014/05/2014-05-15_BCLI-Consultation-Paper-on-Terminating-a-Strata-FINAL.pdf>.
 5. BCLI rep no 79 (Vancouver: The Institute, 2015), online: <www.bcli.org/wordpress/wp-content/uploads/2015/02/2015-02-20_BCLI-SPL-Ph2-Report-on-Terminating-a-Strata-FINAL.pdf>.
 6. See *Natural Gas Development Statutes Amendment Act, 2015*, SBC 2015, c 40, ss 37–55 [in force 28 July 2016].
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of British Columbia, the Ministry of Natural Gas Development and Responsible for Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

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Brief biographies of committee members may be found in appendix C.⁷

What are complex stratas?

The title of this consultation paper requires some explaining. After all, neither the act nor the regulation makes any reference to a “complex strata.” The expression isn’t a legal term of art. It’s actually a phrase that cropped up during consultations held for the phase-one project.

During those consultations, participants repeatedly made the point that mixed-use stratas were rising in both popularity and sophistication. There was a sense of marked changes coming about after the development of the *Strata Property Act* in the 1990s, which could not be fully anticipated in either the act or its regulation.

But rather than restricting the focus of the phase-two project just to mixed-use stratas, consultation participants urged BCLI to adopt a wider view. This was the genesis of the complex-strata concept. It was felt to be a flexible concept that could embrace all kinds of stratas that show significant sophistication in their development or heightened diversity in the uses they encompass.

This concept has carried through into this consultation paper. Although much of this consultation paper is concerned with issues that arise in mixed-use stratas, it also examines issues that may occur in strata properties that feature only a single use. Conversely, the consultation paper doesn’t address all possible ways of organizing a mixed-use strata.

Although the notion of a complex strata has its roots not in law but in observations about trends in the real-estate sector, this consultation paper is very much focussed on how the *Strata Property Act* and the *Strata Property Regulation* address these trends. Its three major topics—rules on sections, types, and phases—may initially seem to be discrete, unconnected subjects. But attentive readers will notice common themes related to cost sharing, control of common property, and strata-corporation governance coming up repeatedly in relation to all three topics.

These common themes form enough of a connection to justify bringing together sections, types, and phases into a single consultation paper. The subjects of this consultation paper are also unified to a degree by the committee’s approach to them. This approach began with a top-to-bottom review of the arguments for and against re-

7. See below at 251.

taining each of the three as part of the legal framework for complex stratas. As will be seen, the committee concluded that sections, types, and phases should be retained, but that significant fine tuning of each is needed to ensure the optimal operation of that legal framework.

The structure of this consultation paper

The structure of this consultation paper largely reflects the division of its subject (complex stratas) into three distinct parts: sections, types, and phases. Each of these topics gets its own chapter. But, before delving into sections, types, and phases, the consultation paper opens with a chapter that discusses some basic terms and concepts in strata-property law, leading up to an illustration of a key issue that figures into each of the three chapters that follow it: the cost-sharing problem.

After this general chapter, each chapter on the main topics of this consultation paper is organized similarly. The chapter begins by setting out background information on its topic—sections, types, or phases. It discusses how the law on these topics developed in British Columbia and examines, in a thematic way, the current position of the law in this province under the *Strata Property Act* and the *Strata Property Regulation*. Then, examples of equivalent provisions in force or under consideration in selected jurisdictions outside British Columbia are discussed.

This extensive background information sets the stage for the next part in each chapter, which concerns the identification of issues for reform and the consideration of options to address those issues. This discussion culminates in the committee's tentative recommendation for reform for each issue—that is, its specific proposal to address the concern raised by the issue for reform.

The issues for reform begin, in each case, with the general question of whether British Columbia should retain sections, types, or phases. The committee is very much interested in the public's views on these basic questions, even though it has tentatively recommended retaining sections, types, and phases. From the general issues, the chapter moves on to consider highly specific, detailed changes that the committee is tentatively in favour of (or in some cases, tentatively opposed to) seeing made to the legal framework for complex stratas. The committee is interested in hearing whether the public agrees with its decisions and in receiving comments that may help to refine its proposals.

How to have your say

There are multiple means to use in commenting on the committee's tentative recommendations for reform. Comments may be sent by email, regular mail, fax, or

Consultation Paper on Complex Stratas

online survey. (The coordinates for each option are found near the front of this consultation paper, on the page headed “call for responses.”)

There are also two distinct versions of the consultation paper that readers may review and respond to.

The full consultation paper contains all 68 tentative recommendations made by the committee. It also sets out a detailed discussion on the history of British Columbia’s legislation on sections, types, and phases, the current rules in the *Strata Property Act*, and options for reform pursued in Canada and internationally. You may respond to all 68 tentative recommendations or to just those tentative recommendations that interest you.

The summary consultation features three highlighted proposals drawn from the committee’s tentative recommendations. It does not include detailed background information. The summary consultation can be found in appendix B.⁸ It can also be obtained as a separate, freestanding document by downloading a copy from <http://www.bcli.org>.

8. See below at 233.

CHAPTER 2. STRATA-PROPERTY BASICS AND THE COST-SHARING PROBLEM

Introduction

This chapter’s goal is to acquaint readers with some basic strata-property terms and concepts. Readers who are already generally familiar with the structure and operation of strata properties may decide to skip this chapter.

The introduction to strata-property law in this chapter isn’t intended to be comprehensive.⁹ Instead, it offers just enough information to allow readers who are new to the subject to find their way through the chapters that follow. The topics that are discussed in this chapter are also intended to act as an introduction to an issue that crops up again and again in relation to complex stratas. This issue concerns how British Columbia’s strata-property law allocates responsibility for a strata corporation’s common expenses—what this consultation paper calls the cost-sharing challenge.

The essential elements of a strata property

Strata properties¹⁰ are a legal device that accommodates individual ownership of an interest in land within a collective, multi-unit structure. The law contains many such devices. What sets a strata property apart from, say, a cooperative, a joint tenancy, a tenancy in common, or a long-term lease, are the following “two essential elements”:

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9. See Gerry Fanaken, *Understanding the Condominium Concept: An Insightful Guide to the Strata Property Act* (Coquitlam, BC: Paige Condominium Services, 2013); Mike Mangan, *The Condominium Manual: A Comprehensive Guide to Strata Law in British Columbia*, 3rd ed (Vancouver: Strata Publishing, 2010) (comprehensive general publications on strata-property law in British Columbia); Continuing Legal Education Society of British Columbia, ed, *British Columbia Strata Property Practice Manual* (Vancouver: Continuing Legal Education Society of British Columbia, 2008) (loose-leaf 2016 update) (leading legal-practice guide on strata properties in British Columbia).
 10. For many people the name *strata property* itself is the first stumbling block that’s encountered in a discussion of this area of the law. British Columbia is the only jurisdiction in Canada that uses this name. Its significance is mainly historical: it reflects the origins of this province’s law in legislation that was enacted first in Australia. Other Canadian provinces and territories drew on American law to create their legislation. So they adopted the leading American word, *condominium*. The two terms actually describe the same concept. Nothing in law turns on the use of one or the other.

Consultation Paper on Complex Stratas

- the division of property into units, to be individually owned, and common elements, to be owned in common by the owners of the units; and
- an administrative framework to enable the owners to manage the property.¹¹

These essential elements exist within a body of law that “reflects the combination of several legal concepts”—especially concepts drawn from real-estate law, easements, and corporate law.¹²

The three generations of strata-property legislation

Introduction

It might be possible to achieve this combination of rules and essential elements by carefully executed easements and agreements. But throughout Canada, the United States, and Australia, strata properties have been fostered by legislation.

British Columbia is no exception to this approach. This province has supported the creation and administration of strata properties by legislation, which can be seen as developing in three distinct generations.

Strata Titles Act 1966–74

In 1966, British Columbia became the first jurisdiction in Canada to adopt strata-property legislation. The first-generation act, called the *Strata Titles Act*, came into force in September of that year.¹³

The 1966 act was skeletal legislation. It did little more than enable people to create strata properties.

Strata Titles Act/Condominium Act 1974–2000

In 1974, the second generation of the legislation appeared.¹⁴ The 1974 act retained the framework set out in the 1966 act and enhanced it by adding new provisions

11. Ontario Law Reform Commission, *Report on the Law of Condominium* (Toronto: Department of the Attorney General, 1967) at 3.

12. *Shaw Cablesystems v Concord Pacific Group*, 2007 BCSC 1711 at para 6, 288 DLR (4th) 252, Leask J (quoting 2475813 *Nova Scotia Ltd v Rodgers*, 2001 NSCA 12 at para 5, 41 RPR (3d) 129, Cromwell JA).

13. SBC 1966, c 40 [1966 act].

14. *Strata Titles Act*, SBC 1974, c 89 [1974 act].

dedicated to consumer protection and addressing concerns about the administration of strata properties.

In 1977, significant amendments to the second-generation act were enacted.¹⁵ Many of the issues discussed in this consultation paper trace their way back to provisions first enacted in either the 1974 act or the 1977 amending act.

In 1979, the name of the legislation was changed to *Condominium Act*.¹⁶ The second-generation act is commonly known by this name.

Strata Property Act 2000–present

The third generation of strata-property legislation, the *Strata Property Act*, was enacted in 1998.¹⁷ The *Strata Property Act* was only brought into force after a transitional period, which lasted until 1 July 2000.

Although it preserves much of the framework in place in the first two generations of the legislation, the *Strata Property Act* is a far more comprehensive statute than its two predecessors.

Parts of the *Strata Property Act* have been significantly amended in 2009,¹⁸ 2012,¹⁹ and 2015.²⁰ These changes primarily relate to financial planning, dispute resolution, and termination; they don't have much bearing on this consultation paper's main subjects of sections, types, and phases.

The *Strata Property Act* is probably the most detailed and sophisticated legislation of its kind in Canada. It contains an array of rules on subjects that aren't addressed in equivalent statutes found in the other provinces or territories. But the act was also consciously drafted to provide enhanced flexibility to certain kinds of stratas. The stratas that benefit from this flexibility tend to be complex stratas. This quality can make it difficult to discuss the act's provisions, as it's often necessary to note both a general rule and a series of exceptions. For the sake of simplicity, the pages that fol-

15. *Strata Titles Amendment Act, 1977 (No 2)*, SBC 1977, c 64 [1977 amending act].

16. RSBC 1979, c 61.

17. *Supra* note 1.

18. See *Strata Property Amendment Act, 2009*, SBC 2009, c 17.

19. See *Civil Resolution Tribunal Act*, SBC 2012, c 25.

20. See *Natural Gas Development Statutes Amendment Act, 2015*, *supra* note 6.

low will focus on the general rules and will touch on exceptions, where necessary, in footnotes.

The owner-developer

The individual who or (more typically) corporation or partnership that starts the stratification process is called an *owner-developer*.

Before someone becomes an owner-developer, that person is an owner of land²¹ who wants to develop it as a strata property. That person is responsible for shepherding the project through the procedure for stratifying land. After this process is complete, the owner-developer holds all titles in the development, which are gradually sold off to purchasers.

The owner-developer can have a decisive influence over both the original conception and the ongoing operation of a strata property. Many of the key decisions that are made in setting up a complex strata, in particular, originate with the owner-developer. These decisions can reverberate long after the owner-developer has left the scene.

Creation of a strata property by deposit of a strata plan

The stratification process begins with the deposit in the land title office of a strata plan.

The strata plan has been described as “the fundamental document that divides property into strata lots and creates title in each of those strata lots.”²² It is a document prepared by a qualified land surveyor, which is required to contain specific details and meet exacting technical standards.²³

21. And here’s the first exception to note: in some cases, it isn’t the landowner but rather a lessee under a long-term ground lease who acts as the owner-developer. The act calls these cases *leasehold strata plans*. For simplicity’s sake, this consultation paper will focus on the much more common case of a landowner developing a strata property and will downplay the rarer leasehold strata plan. That said, there is nothing in law that prevents the committee’s proposals from extending to leasehold strata plans. The committee plans to study leasehold stratas generally in a later publication of the Strata Property Law Project—Phase Two.

22. *Chow v The Owners, Strata Plan NW 3243*, 2015 BCSC 1944 at para 5, [2015] BCJ No 2306 (QL), Smith J.

23. See *Strata Property Act*, *supra* note 1, s 244.

There are essentially two kinds of strata plans under the *Strata Property Act*. One is called a *bare-land strata plan*. It concerns the subdivision of land.²⁴

The other kind of strata plan isn't named in the act, but it's commonly called a *building* or *conventional* strata plan.²⁵ This kind of strata plan deals with the subdivision of a building. This is the more common kind of strata plan.

Among the things that a strata plan does, one of the most important is to distinguish between the two basic building blocks of a strata property: strata lots and common property.

Strata lots

A *strata lot* is the legislation's name for the unit in a strata property that is individually titled and owned. A common example of a strata lot is an apartment in a residential strata property. But it is important to bear in mind that nothing in strata-property law restricts strata lots to apartments or residential uses. Strata lots may be townhouses, shops used for commercial purposes, industrial plants, recreational cottages, or parking lots. So long as they are identified as such on a strata plan, strata lots may be almost anything within the ingenuity of an owner-developer.

But, that said, the act does, in many places, distinguish between strata lots based on their uses. This distinction turns on whether or not the strata lot is used for residential purposes. *Residential strata lot* is a defined term, meaning "a strata lot designed or intended to be used primarily as a residence."²⁶ Strata lots used for any other purpose are referred to as *nonresidential strata lots*. Whether a strata lot is a residential strata lot or a nonresidential strata lot can have a bearing on how certain rules relating to property, expenses, and governance are applied to it.

24. See *ibid*, s 1 (1) "bare land strata plan" ("means (a) a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the floors, walls or ceilings of a building, or (b) any other strata plan defined by regulation to be a bare land strata plan."). Regarding paragraph (b), note that to date no regulations on this point have been adopted.

25. See Adrienne M Murray, "The Basics of Strata Property Law," in Continuing Legal Education Society of British Columbia, ed, *Strata Property—2006 Update: Materials prepared for the Continuing Legal Education seminar, Strata Property Fundamentals for Lawyers, held in Vancouver, B.C., on October 20, 2006* (Vancouver: Continuing Legal Education Society of British Columbia, 2006) 1.1 at 1.13; Mangan, *supra* note 9 at 17; *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 1.14.

26. *Supra* note 1, s 1 (1) "residential strata lot."

The combination of residential and nonresidential strata lots in a single strata property gives rise to what is colloquially called a *mixed-use strata*. Mixed-use stratas are, of course, an important component of the subject matter of this consultation paper, complex stratas—they will be encountered again and again in the pages that follow.

Common property, limited common property, and common assets

The *Strata Property Act* contains a multi-layered definition of *common property*.

In the first layer, the act simply defines common property as “that part of the land and buildings shown on a strata plan that is not part of a strata lot.”²⁷ This is a broad, open-ended definition, which might not be simple to grasp on first reading. Some concrete examples of common property to think of are hallways, lobbies, elevators, courtyards, gardens, roads, and recreational facilities. Of course, common property isn’t limited to those things; that’s why it’s defined in such general terms.

The second layer of the act’s definition goes on to sweep an extensive list of building components into the definition of common property:

pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located (i) within a floor, wall or ceiling that forms a boundary (A) between a strata lot and another strata lot, (B) between a strata lot and the common property, or (C) between a strata lot or common property and another parcel of land, or (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property.²⁸

The point here is that certain specified things that are essential to the functioning of a strata development will be common property even though they may be partially or even wholly located within a strata lot.

Within the scope of common property, the act embeds the concept of *limited common property*. This is common property that has been “designated for the exclusive use of the owners of one or more strata lots.”²⁹ Some typical examples of things that might be limited common property are a balcony for an apartment in a high-rise

27. *Ibid*, s 1 (1) “common property.”

28. *Ibid*, s 1 (1) “common property.”

29. *Ibid*, s (1) (1) “limited common property.”

tower, a patio for a townhouse or ground-floor apartment, and a parking space in a parking lot.

But it should be borne in mind that these items are not necessarily limited common property and they don't exhaust the category of limited common property. The definition of the term is general and open-ended. The key to knowing whether common property is limited common property is the designation. There are two ways to make this designation. It may be made on the original strata plan or an amendment to that strata plan.³⁰ Or it may be made by a resolution of the strata corporation, passed by a 3/4 vote, and filed in the land title office along with a sketch plan.³¹

Finally, the act also characterizes some property as *common assets*. The definition of common assets contains two categories. The first is "personal property held by or on behalf of a strata corporation."³² Examples of this category include items of property like furniture in a lobby or exercise equipment in a gym. The second category is "land held in the name of or on behalf of a strata corporation, that is (i) not shown on the strata plan, or (ii) shown as a strata lot on the strata plan."³³ An example of (i) is any offsite land owned or held on behalf of the strata. An example of (ii) is a caretaker's suite in a residential building which is a strata lot.

The strata corporation

In addition to dividing land into strata lots and common property, depositing a strata plan in the land title office "establishes" a strata corporation.³⁴ This strata corporation is the third piece (along with the strata lots and common property) in the essential elements of a strata property. It is the vehicle by which strata-lot owners are able to administer their strata property.

The act says that the purpose of a strata corporation is to take responsibility for "managing and maintaining the common property and common assets of the strata

30. *Ibid*, s 73 (a)-(b).

31. *Ibid*, ss 73 (c), 74. The sketch plan referred to in the text must be one that "(a) satisfies the registrar [of land titles], (b) defines the areas of limited common property, and (c) specifies each strata lot whose owners are entitled to the exclusive use of the limited common property" (*ibid*, s 73 (2)).

32. *Ibid*, s 1 (1) "common asset."

33. *Ibid*, s 1 (1) "common asset."

34. *Ibid*, s 2 (1) (a).

corporation for the benefit of the owners.”³⁵ Ownership of common property and common assets is in the hands of the strata-lot owners, collectively.³⁶ The membership of the strata corporation is made up of “the owners of the strata lots in the strata plan.”³⁷ The strata corporation is the means for coordinating these owners to make effective and timely collective decisions.

Effective decision-making raises the whole topic of strata-corporation governance. This area is worthy of a lengthy study in its own right.³⁸ For the purposes of understanding complex stratas, it’s necessary to have a handle on a few key elements of strata-corporation governance.

The fundamentals of strata-corporation governance

Bylaws and rules

A strata corporation is required to have bylaws.³⁹ Bylaws are a third-order set of rules to govern strata properties, ranking in priority below the act and its regulations.⁴⁰ That said, for many issues, the “bylaws, more than any other document, direct the conduct of owners, tenants and occupants” and visitors.⁴¹ Bylaws are instrumental for establishing sections and types, and they can be of decisive importance in operating a phased strata property.

By default, the legislation provides strata corporations with a set of standard bylaws.⁴² But strata corporations are free to amend these standard bylaws or to create their own bylaws, so long as these bylaw amendments are approved by a 3/4 vote, are filed in the land title office, and do not conflict with the *Strata Property Act*, the

35. *Ibid*, s 3.

36. See *ibid*, s 66 (“An owner owns the common property and common assets of the strata corporation as a tenant in common in a share equal to the unit entitlement of the owner’s strata lot divided by the total unit entitlement of all the strata lots.”).

37. *Ibid*, s 2 (1) (b).

38. And the committee plans to take on selected issues in governance as part of a later publication in this project.

39. See *Strata Property Act*, *supra* note 1, s 119 (1).

40. See *ibid*, s 121.

41. Murray, *supra* note 25 at 1.1.2.

42. See *supra* note 1, s 120.

Strata Property Regulation, or any other enactment or law.⁴³ Complex stratas will inevitably require amended bylaws that contain a raft of specialized provisions.

Bylaws may address the following topics:

- “the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation”;⁴⁴
- “the administration of the strata corporation.”⁴⁵

Unlike bylaws, rules are optional for a strata corporation. Rules are also more limited in scope than bylaws, as they may only govern “the use, safety and condition of the common property and common assets.”⁴⁶ Rules can’t be used to govern strata lots or to address the administration of a strata corporation, so they are of limited significance when it comes to understanding complex stratas.

General meetings

The act requires many strata-corporation decisions to be made by the owners collectively. These decisions are typically identified as ones calling for a “resolution” as evidence of the decision. Resolutions are considered and either adopted or rejected at general meetings of the strata corporation.

Strata corporations are required to have at least one general meeting a year—called, appropriately, an annual general meeting.⁴⁷ The standard bylaws contain the order

43. See *ibid*, ss 126–28 (rules on bylaw amendment), 120 (1) (filing amendments in the land title office), 121 (unenforceable bylaws). On the last point, in addition to being unenforceable due to a conflict with an enactment or a law, a bylaw is unenforceable to the extent it “destroys or modifies” one of the easements for support, services, or shelter created under the act or “prohibits or restricts the right of an owner of a strata lot to freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot” (*ibid*, s 121 (1) (b)–(c)). Of course, there are exceptions to the last point, which allow a strata corporation to put in place rental restrictions, restrictions on the sale of a strata lot, or age restrictions, all of which must conform strictly to detailed requirements contained in the act (see *ibid*, s 121 (2)).

44. *Ibid*, s 119 (2).

45. *Ibid*, s 119 (2).

46. See *ibid*, s 125.

47. See *ibid*, s 40. There is an exception to this requirement: if all eligible voters agree, they may consent in writing to the main business of the meeting (namely passing a budget and electing a strata council) and may waive, each by a written document, the holding of an annual general meeting (see *ibid*, s 41).

of business for the annual general meeting's agenda.⁴⁸ Strata corporations may also have any number of special general meetings.⁴⁹

The act contains a detailed and exacting set of rules on the calling and conduct of general meetings.⁵⁰ For the purposes of this discussion, it's only necessary to take some notice of how the act deals with voting.

Votes are ultimately how decisions at general meetings get made. The basic position is majority rule—what the act calls *majority vote*.⁵¹ A resolution passed by a majority vote is one that was approved by more than half of the votes cast by owners—or their proxyholders, if there are any—at the general meeting.⁵² In other words, the question is decided by the majority of owners (and proxyholders) present at the meeting and not abstaining from voting.

Some decisions require approval by more than a majority of voters. The most common form of this kind of approval is what the act calls a *3/4 vote*.⁵³ A resolution is passed by a 3/4 vote when at least 75 percent of the votes cast at a general meeting are in favour of it.⁵⁴ In certain exceptional cases, the act demands that a resolution

48. See *ibid*, Schedule of Standard Bylaws, s 28.

49. See *ibid*, s 42.

50. See *ibid*, ss 45–50, 53–58. See also *Report on Terminating a Strata*, *supra* note 5 at 63–71; Fanaken, *supra* note 9 at 36–48, 52–55; Mangan, *supra* note 9 at 101–14; *British Columbia Strata Property Practice Manual*, *supra* note 9 at §§ 6.36–6.74.

51. See *supra* note 1, s 1 (1) “majority vote” (“means a vote in favour of a resolution by more than 1/2 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting”).

52. The act doesn't actually refer to *owners* voting; its term is *eligible voters*. This term reflects two concerns: (1) sometimes an owner's vote for a strata lot may be exercised by someone other than an owner, such as a tenant (see *ibid*, s 54 (b)), a mortgagee (see *ibid*, s 54 (c)), a parent, guardian, or other representative (see *ibid*, s 55), or a court-appointed voter (see *ibid*, s 58); and (2) in some cases, an owner may lose the right to vote if the owner is in default of certain payments owing to the strata corporation and the strata corporation is thereby entitled to file a lien against that owner's strata lot (see *ibid*, ss 53 (2), 116 (1)). These are all exceptional cases, so for brevity's sake the text will simply refer to owners voting.

53. See *ibid*, s 1 (1) “3/4 vote” (“means a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting”).

54. A special rule comes into play if “a resolution required to be passed by a 3/4 vote is passed at an annual or special general meeting by persons holding less than 50% of the strata corporation's votes” (*ibid*, s 51 (1)). Under this rule, “[w]ithin the one week following the vote, persons holding at least 25% of the strata corporation's votes may, by written demand, require that the strata

be supported by a *unanimous vote* in order for it to be approved.⁵⁵ A resolution only meets this threshold when *all* strata-lot owners vote for it. So, unlike resolutions passed by a majority vote or a 3/4 vote, a resolution can't be passed by a unanimous vote if it is supported just by all the owners who turn up to the general meeting and vote for it if there are other owners who don't attend the meeting (in person or by proxy) or who abstain from voting.⁵⁶

The strata council

A strata corporation must have a strata council.⁵⁷ The strata council is elected at each annual general meeting, with its members usually coming from the strata-lot owners.⁵⁸

The strata council has been described as being “effectively a board of directors”⁵⁹ and “somewhat analogous to a fourth level of government.”⁶⁰ These descriptions reflect the act's basic position, which is that the “powers and duties of the strata corporation must be exercised and performed by a [strata] council.”⁶¹ As a rule of thumb, this means that the strata council has the authority to make decisions respecting the strata corporation, except for those decisions where the act calls for a resolution at a general meeting.⁶²

corporation hold a special general meeting to reconsider the resolution” (*ibid*, s 51 (3)). If that special general meeting attracts a quorum of owners, and if the resolution is not passed again by a 3/4 vote at that meeting, then the strata corporation may not implement the resolution (see *ibid*, s 51 (10)).

55. See *ibid*, s 1 (1) “unanimous vote” (“means a vote in favour of a resolution by all the votes of all the eligible voters”).
56. *Natural Gas Development Statutes Amendment Act, 2015*, *supra* note 6, has created a new type of resolution: a resolution passed by an 80-percent vote, which applies only to termination of a strata property.
57. See *Strata Property Act*, *supra* note 1, s 25.
58. See *ibid*, s 28 (1). While strata-council members are in fact drawn overwhelmingly from the ranks of owners, the legislation actually allows three groups presumptively to be strata-council members: (1) owners; (2) individuals who represent corporate owners; and (3) tenants who have been assigned an owner's right to vote (*ibid*, s 28 (1)). Further, the act allows strata corporations to adopt bylaws that allow other classes of people to be strata-council members (*ibid*, s 28 (2)).
59. Mangan, *supra* note 9 at 39.
60. Fanaken, *supra* note 9 at 21.
61. *Supra* note 1, s 4.
62. See Murray, *supra* note 25 at 1.1.4 (“Where the Act does not reference a vote by the owners . . . the activity or duty may be performed by the strata council without input from the owners.”)

Budgets and funds

The act requires the strata corporation to “establish,” and the strata-lot owners to “contribute, by means of strata fees,” to, the following two funds:

- “an operating fund for common expenses that (i) usually occur either once a year or more often than once a year, or (ii) are necessary to obtain a depreciation report”;⁶³ and
- “a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.”⁶⁴

The act addresses the establishment of these funds, raising of their contributions, expenditures from them, and accounting for those expenditures.⁶⁵ At the centre of these functions is the strata corporation’s annual budget.⁶⁶

A typical year for a strata corporation

One commentator has helpfully gathered all these pieces together to provide a picture of how strata-corporation governance plays out in a typical year. Her description is worth quoting in detail.

The strata corporation’s activities can be reviewed on an annual cycle beginning with the election of a strata council at an annual general meeting. At that meeting the owners also approve the budget for the upcoming year. The budget provides the direction to the strata council in relation to the expenditures that are permitted. . . .

During the course of the year, the strata council will meet on a regular basis to consider the business of the strata corporation. The strata council will make decisions regarding the repair and maintenance that must be carried out and the contracts to be entered into such as landscaping, elevator servicing and garbage removal.

The strata council must respond to complaints from owners regarding breaches of by-laws and may be required as a result of such complaints to take enforcement action with respect to the bylaws.

However, where the Act requires a vote of the owners, the decision to be made is not one for the strata council alone and can only be made with the approval of the owners based on the voting threshold set out in that section.”).

63. *Supra* note 1, s 92 (a).

64. *Ibid*, s 92 (b).

65. See *ibid*, ss 92, 93, 95–100, 103–09.

66. See *ibid*, s 103.

Consultation Paper on Complex Stratas

The strata council will also deal, during the course of the year, with requests for alterations to strata lots and common property as provided for in the strata corporation's bylaws. . . . During the course of the year, the strata council is required to review the insurance and ensure that the strata corporation is appropriately insured as required by the Act.

The strata council may, during the year, consider whether amendments should be made to the bylaws and may embark on a process to obtain the input of owners to bylaw changes.

The strata council may also be faced with expenses that occur less often than annually[,] which will require owner approval by means of a 3/4 vote in order to spend funds from the [contingency reserve fund] or raise funds by means of a special levy.

During the course of the year, the strata council may call special general meetings to consider matters such as bylaw amendments or raising funds by means of a special levy or removing funds from the [contingency reserve fund]. . . .

As the year winds to a close, the strata council must prepare the financial statements and the budget for the up coming year so that this information can be provided to owners with the notice for the next annual general meeting. If, during the course of the year, the strata council created rules, the owners must ratify the rules at the annual general meeting unless the rules were ratified at a special general meeting held during the year.⁶⁷

Readers may want to keep this description in mind as they review the chapters that follow. But what should also be borne in mind is that many of the issues discussed later in this consultation paper spring from unexpected events, accidents, and unanticipated crises, all of which can complicate strata-corporation governance. It's necessary to pay heed to both typical and untypical years in the life of a strata property.

Common expenses

Many of the decisions that a strata corporation has to make concern spending money to pay for expenses. The act makes the strata-lot owners collectively responsible for what it calls *common expenses*, which it defines as expenses

- relating to the common property and common assets of the strata corporation, or
- required to meet any other purpose or obligation of the strata corporation.⁶⁸

Common expenses often relate to the first bullet point and are, in effect, the flip side of owning property in common. The strata corporation has a legal obligation to “repair and maintain common property and common assets.”⁶⁹

67. Murray, *supra* note 25 at 1.1.12–1.1.13.

68. *Supra* note 1, s 1 (1) “common expenses.”

Although the strata corporation is responsible for common expenses,⁷⁰ paying for repairs—as for all common expenses—ultimately comes from contributions from strata-lot owners. How these contributions are determined leads to consideration of one of the act’s foundational concepts, unit entitlement.

Unit entitlement

What is unit entitlement and how is it used?

At bottom, unit entitlement is a number. Each strata lot in a strata property is assigned its own unit-entitlement number.

The act uses unit entitlement in a way that ties this concept into one of the defining characteristics of a strata. This defining characteristic is the unique strata property-ownership model, which combines individual ownership of strata lots with shared ownership, among strata-lot owners, of a strata’s common property and common assets, and shared responsibility for the debts and liabilities of the strata corporation.

Specifically, unit entitlement is used in “calculations” that “determine” each strata lot’s share of:

- common property;
- common assets;
- common expenses; and
- liabilities of the strata corporation.⁷¹

69. *Ibid*, s 72 (1). This obligation is subject to two exceptions, which allow the strata corporation to adopt a bylaw to “make an owner responsible for the repair and maintenance of (a) limited common property that the owner has a right to use, or (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions” (*ibid*, s 72 (2)). The second exception is currently a dead letter, as there are no regulations enabling its application. Strata-lot owners are generally responsible for the repair and maintenance of their strata lots, but the act does allow the strata corporation to adopt a bylaw to “take responsibility for the repair and maintenance of specified portions of a strata lot” (*ibid*, s72 (3)).

70. See *ibid*, s 91.

71. *Ibid*, s 1 (1). Some jurisdictions go even further than British Columbia and use unit entitlement to determine a strata lot’s voting rights and its share of residual property after termination.

How is unit entitlement determined?

The act has a detailed set of rules on how to determine the unit entitlement of a strata lot. Which rules apply in a given case depends on (1) the use of the strata lot and (2) the kind of strata plan at issue.

The act distinguishes between residential and nonresidential uses, and contains a special rule for mixed-use stratas. The methods for determining the unit entitlement of a strata lot are:

- **for residential strata lots:** one of (a) the habitable area of the strata lot, (b) a whole number that is the same for all residential strata lots, or (c) a number that “allocates a fair portion of the common expenses to the owner of the strata lot,” in the opinion of the superintendent of real estate, who must approve any use of option (c);⁷²
- **for nonresidential strata lots:** one of (a) the total area of the strata lot, (b) a whole number that is the same for all nonresidential strata lots, or (c) a number that “allocates a fair portion of the common expenses to the owner of the strata lot,” in the opinion of the superintendent of real estate, who must approve any use of option (c);⁷³
- **for mixed-use stratas:** “[i]f the strata plan consists of both residential and nonresidential strata lots,” then unit entitlement “must be approved by the superintendent as fairly distributing the common expenses between the owners of the residential strata lots and the owners of the nonresidential strata lots.”⁷⁴

For residential and nonresidential strata lots, in most cases unit entitlement is determined using option (a). In effect, this means that the size of the strata lot determines its unit entitlement. It is slightly more complicated than that, because the act relies on two different standards for determining the size of a strata lot.

For residential strata lots, the size of a strata lot is determined by measuring its *habitable area*. This is a defined term,⁷⁵ which effectively limits unit entitlement to living areas in a strata lot, excluding things like “patios, balconies, garages, parking stalls or

72. *Ibid*, s 246 (3) (a).

73. *Ibid*, s 246 (3) (b).

74. *Ibid*, s 246 (5).

75. See *ibid*, s 246 (4).

storage areas other than closet space.”⁷⁶ For nonresidential strata lots, size is determined by the *total area* of the strata lot.⁷⁷

In both cases, option (a) requires unit entitlement to be “determined by a British Columbia land surveyor.”⁷⁸

These rules only apply when the strata plan is a conventional (building) strata plan. For bare-land strata plans, a special rule comes into play.⁷⁹

When is unit entitlement determined and where is it found?

The unit entitlement of a strata lot must be determined at the outset of the stratification process. The act requires the “person applying to deposit a strata plan” to include the unit entitlements of the strata lots in the strata plan.⁸⁰ These unit-entitlement numbers are grouped together as a schedule to the strata plan, called the Schedule of Unit Entitlement.⁸¹ This schedule is the definitive source of the unit entitlement of a strata lot in that strata plan.

The cost-sharing challenge

Introduction: Three problems for complex stratas

With these basic terms and concepts established, it’s now possible to turn to issues that specifically bear on complex stratas. An early pair of commentators on the creation and operation of complex stratas observed challenges in the following three areas:

- decision-making;

76. *Strata Property Regulation*, *supra* note 2, s 14.2.

77. Total area isn’t a defined term; it simply takes its everyday meaning. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 2.39 (“‘total area’ includes all of those areas listed as excluded from ‘habitable area’ of a residential strata lot”).

78. *Supra* note 1, s 246 (3) (a), (b).

79. *Ibid*, s 246 (6) (“The unit entitlement of a strata lot in a bare land strata plan must be (a) a whole number that is the same for all of the strata lots in the strata plan, or (b) a number that is approved by the superintendent and that in the superintendent’s opinion allocates a fair portion of the common expenses to the owner of the strata lot.”).

80. *Ibid*, s 246 (2).

81. See *ibid*, s 246 (2). The schedule is a prescribed form. See *Strata Property Regulation*, *supra* note 2, Form V.

- cost sharing; and
- compatibility of (and restrictions on) uses.⁸²

Attentive readers will notice these three common themes in the discussion of sections, types, and phases in the chapters that follow. But one of these problems will appear much more often than the others. It was the problem that vexed the committee's deliberations and dominated the committee's review of options for reform. This issue is the challenge of cost sharing, which assumes a status of something like first among equals among the three problems noted above, and which needs to be singled out for some introductory discussion here.

The cost-sharing challenge has been spelled out simply in the following terms:

If different uses are being made within one development, the users may use services, amenities and utilities within the development to a different extent. An equitable way to divide the costs of providing these services, amenities and utilities is, therefore, required.⁸³

On the face of it, this seems like an obvious problem that should have a straightforward solution. But a lot of subtlety and conceptual difficulty is hidden in the words "equitable way" in the above passage. To begin to unpack it, it's necessary first to look at the act's general approach to sharing common expenses, then at how it allows for exceptions to that general approach.

The general rule for sharing common expenses

As a leading case puts it, when it comes to common expenses, "[t]he general rule under the [*Strata Property Act*] is that within a strata corporation 'you are all in it together.'"⁸⁴ The act implements this general rule by a series of provisions requiring owners to share common expenses by means of a formula based on the unit entitlement of an owner's strata lot.

82. See Christine S. K. Elliott & Elinor M. Hart, "Mixed-Use Condominium Developments," in Continuing Legal Education Society of British Columbia, ed, *Real Estate—1998 Update* (Vancouver: Continuing Legal Education Society of British Columbia, 1998) 5.1 at 5.1.02 ("The problems created by mixed-use developments, regardless of how these developments are structured, stem from three basic problems.").

83. *Ibid.*

84. *The Owners, Strata Plan LMS 1537 v Alvarez*, 2003 BCSC 1085 at para 35, 17 BCLR (4th) 63 [*Alvarez*], Bauman J.

For an important example of how the act uses unit entitlement to implement the general rule of strata-lot owners “all being in it together,” consider the act’s rules on calculating strata fees.⁸⁵ Strata fees, which make up contributions to a strata corporation’s operating fund and its contingency reserve fund, are to be calculated using the following formula:⁸⁶

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

This formula also applies when a strata corporation raises funds by way of a special levy.⁸⁷

The general rule appears to work well in many cases. The rule is based on unit entitlement, which is most often determined by the habitable area or the total area of a strata lot. The size of a strata lot determined in these ways is often an effective proxy for both the strata-lot owner’s consumption of services and ability to pay strata fees and special levies. So a basic fairness is often the result of this approach.⁸⁸

Unfairness, the general rule, and the three subjects of this consultation paper

But there are cases in which the application of the general rule can be felt by some strata-lot owners to be creating unfairness—“there will always be strata-lot owners who will argue that their strata lot is different, for one reason or another, and that they should not share common expenses by reference to unit entitlement.”⁸⁹

“Unfairness” is something of a quicksilver concept: easy to invoke in the abstract, but difficult to pin down in concrete cases. To get a handle on why a strata corporation might feel, in a specific instance, that the act’s general rule on cost sharing could lead to unfair results for them, consider these three examples.

85. See *ibid*, s 99 (1) (“owners must contribute to the strata corporation their strata lots’ shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations”).

86. *Ibid*, s 99 (2).

87. See *ibid*, s 108 (2) (a).

88. See Elliott & Hart, *supra* note 82 at 5.1.05.

89. *Ibid* at 5.1.07.

- **Strata lots with different uses:** a strata property consists of a building with commercial strata lots on its ground floor and residential strata lots on the floors above. Collectively, the commercial strata lots make up 62 percent of the total unit entitlement of the strata property, while the residential strata lots make up the remaining 38 percent. But common expenses relating to parking, storage, access areas, cleaning, electricity, landscaping, and gardening overwhelmingly—in some cases exclusively—benefit the commercial strata lots.⁹⁰
- **Strata lots with different architectural characteristics:** “A [strata property] has both townhouse and apartment units, with significant landscaped areas around the townhouses that enhance the entire [strata property] but are of practical use only to the townhouse occupants.”⁹¹
- **Strata lots developed at different times:** A strata property consisting of four buildings was developed piecemeal, with construction taking place at the following times: 1995 (buildings one and two); 2002 (building three); and 2004 (building four). Building one suffered water-ingress problems starting in 1999, with spot repairs taking place in that year and in subsequent years. In 2004, a plan for a full-scale rainscreening of building one was submitted to all strata-lot owners.⁹²

Presumptively, in each case, the owners will be subject to the general rule of being all in it together and the expenses will be shared according to the formulas established to implement the general rule.

These three examples tie into the subjects of the next three chapters. Sections and types may be used to refine the general rule in certain cases. But as will be seen, adopting either sections or types can bring other legal issues into play.

Phases don’t directly address cost-sharing concerns. But as the third example (which concerns a phased strata plan) shows, phasing may bring cost-sharing problems to the surface.

90. See *Shaw v The Owners Strata LMS 3972*, 2008 BCSC 453, 71 RPR (4th) 255.

91. Allyson L Baker & L Michael Walker, “Sections, Types and Mixed Use Buildings,” in Continuing Legal Education Society of British Columbia, ed, *Strata Property—2011 Update: Materials Prepared for the Continuing Legal Education Seminar, Strata Property Update, Held in Vancouver, B.C., on April 28, 2011* (Vancouver: Continuing Legal Education Society of British Columbia, 2011) 1.1 at 1.1.3.

92. See *Terry v The Owners, Strata Plan LMS 2153*, 2006 BCSC 950, 57 BCLR (4th) 242 [*Terry*].

When the chapters that follow address cost sharing they will be concerned with ways to modify the general rule that still rest on the foundation of unit entitlement as a means to share expenses. But there are ways to depart from this approach to cost sharing entirely. Even though these approaches don't play much of a role in this consultation paper, two are noted in the pages that follow as a way to round out and conclude this chapter.

Changing the general rule: using something other than unit entitlement as a basis for cost sharing

The *Strata Property Act* allows strata-lot owners to agree to “change the basis for calculation of a contribution” to the strata corporation’s operating fund or contingency reserve fund.⁹³ This agreement may only be made at “an annual or special general meeting held after the first annual general meeting.”⁹⁴

The act also allows for strata-lot owners to change the general rule for “calculat[ing] each strata lot’s share of a special levy.”⁹⁵ This change must result in a “way that establishes a fair division of expenses for that particular levy.”⁹⁶

Both rules implicitly allow strata-lot owners to share common expenses by reference to some standard other than unit entitlement. They appear to give strata corporations a high degree of flexibility in structuring their affairs.

But this flexibility is rather illusory, because in both cases the changes require approval by a resolution passed by a unanimous vote.⁹⁷ As was discussed earlier in this chapter,⁹⁸ *unanimous vote* means “a vote in favour of a resolution by all the votes of all the eligible voters.”⁹⁹ This is a very high hurdle to clear. It requires that every strata-lot owner consent to the resolution. In all but the smallest stratas it is very difficult to reach unanimity on a modified rule for cost sharing. So these provisions have limited utility in practice.

93. See *supra* note 1, s 100.

94. *Ibid*, s 100 (1).

95. *Ibid*, s 108 (2).

96. *Ibid*, s 108 (2) (b).

97. See *ibid*, ss 100 (2), 108 (2) (b).

98. See *supra* note 55 and accompanying text.

99. *Strata Property Act*, *supra* note 1, s 1 (1) “unanimous vote.”

Air-space parcels: another approach to cost sharing

Part 9 of the *Land Title Act* deals with so-called air-space titles.¹⁰⁰ It allows “owners of land registered in the Land Title Office to make a grant of an air space parcel, a volumetric parcel, the confines of which are wholly contained within the air space above that land.”¹⁰¹

Air-space parcels are created “by the deposit of an air space plan” in the land title office.¹⁰² An air-space parcel “is treated in all respects as land—it has an indefeasible title and can be transferred, leased, mortgaged and otherwise encumbered.”¹⁰³ An air-space parcel can also be “subdivided in accordance with the *Strata Property Act*,”¹⁰⁴ creating one or more strata properties, along with a remainder parcel.¹⁰⁵

It’s becoming increasingly common for multi-use projects to be developed using air-space parcels and strata properties. “Typically,” notes the leading practice guide, “a single building occupies the air space parcels and the remainder.”¹⁰⁶ Different floors on this building are put to different uses: for example, a parking lot may be located underground, the ground floor and a mezzanine level may have commercial uses, offices may be housed on the intermediate floors, and residential properties may be located on the upper floors. One or more of these zones may be a strata property or strata properties.¹⁰⁷

These developments could be seen as the most complex of complex stratas—that is, if they are to be considered strata properties at all. This question about their status arises because, even though the component parts of such a development may consist of one or more strata properties, the whole exists outside the reach of the *Strata*

100. RSBC 1996, c 250, ss 138–46.

101. Elliott & Hart, *supra* note 82 at 5.1.13 [citations omitted].

102. *Land Title Act*, *supra* note 100, s 141 (1).

103. Elliott & Hart, *supra* note 82 at 5.1.14. See also *Land Title Act*, *supra* note 100, ss 139, 141 (2).

104. *Land Title Act*, *ibid*, 141 (3).

105. See Elliott & Hart, *supra* note 82 at 5.1.14 (“An air space parcel is a unique form of land because it is inherently dependent on the remainder parcel. In this way it is similar to a strata lot, which is dependent on the other strata lots and common property for support, utilities, shelter, etc.”).

106. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 2.17.

107. See Elliott & Hart, *supra* note 82 at 5.1.13 (“If multiple uses will be contained in one building, that building will have to occupy space that has been carved into air space parcels (top to bottom), one or more of which could be stratified, and, therefore, have its own strata corporation.”).

Consultation Paper on Complex Stratas

Property Act.¹⁰⁸ Instead, “the relationship between air space parcel owners is a matter of common law.”¹⁰⁹ As a result, “all of the obligations suitable to the interdependent relationship of the remainder and the air space parcel must be ‘constructed’ ” by the parties and their lawyers.¹¹⁰ In most cases, this is done by granting easements and entering into cost-sharing agreements between the strata corporation or corporations and other air-space-parcel or remainder owners in the development.¹¹¹ These easements and cost-sharing agreements are “registered in the land title office” and are “intended to bind the strata corporation and strata lot owners.”¹¹²

So developments employing air-space parcels are not bound to follow the general rule for cost sharing within a strata corporation. These developments are free to craft their own rules, and all indications are that parties within these developments do tailor rules to their own particular needs. Since there is no obligation to standardize these negotiated rules, and since they are the products of agreements that aren’t subject to the *Strata Property Act*, air-space parcels are outside the scope of BCLI’s Strata Property Law Project—Phase Two and aren’t addressed in this consultation paper.

108. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 2.17 (“[t]he *Strata Property Act* does not apply to an air space plan”); Baker & Walker, *supra* note 91 at 1.1.20 (“The *Strata Property Act* has no application to the relationship between air space parcels, even if [a] strata plan is filed with respect to one of those parcels.”).

109. Baker & Walker, *ibid*.

110. Elliott & Hart, *supra* note 82 at 5.1.14.

111. See Elliott & Hart, *ibid* at 5.1.43–5.1.88 (sample cross-easement for remainder and air-space parcel).

112. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 2.17.

CHAPTER 3. SECTIONS

BACKGROUND

Introduction

The primary goal of the background portion of this chapter is to describe the provisions of the *Strata Property Act*¹¹³ and the *Strata Property Regulation*¹¹⁴ that govern sections. Because British Columbia's current legal framework on sections represents one of a myriad possible ways to approach this topic, the discussion of the present act and regulations is bookended by brief examinations of sections in previous British Columbia legislation and in legislation from jurisdictions outside British Columbia. The chapter begins by considering the question of why British Columbia has legislation on sections at all.

The legislative purpose of sections

The rationale for legislation creating sections ties into one of the higher-level objectives of the *Strata Property Act*.

In introducing the bill¹¹⁵ that became the *Strata Property Act* for first reading, the minister of municipal affairs identified three broad objectives for the whole act.

- The first objective was to address concerns about the complexity of the preceding statute (the *Condominium Act*)¹¹⁶ by drafting the legislation “using plain language” and by clarifying “ambiguities and gaps in the legislation” so that the act would “provide a more complete code for condominium development and governance.”¹¹⁷
- Second, the new act would “balance the interests of various parties such as municipalities, developers, strata corporations and individual owners” by “redefin[ing] and clarif[y]ing the rights and obligations of these parties.”¹¹⁸

113. *Supra* note 1.

114. *Supra* note 2.

115. Bill 47, *Strata Property Act*, 3rd Sess, 36th Parl, British Columbia, 1998.

116. *Supra* note 16.

117. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36th Parl, 3rd Sess, Vol 11, No 19 (13 July 1998) at 9922 (Hon Jenny Wai Ching Kwan).

118. *Ibid.*

- Third, the new act would “provide strata corporations, which must regulate diverse types of strata complexes in ever-changing circumstances, with greater flexibility so that they can adapt to changes and better meet the needs of their owners.”¹¹⁹

Sections are one of the means that the *Strata Property Act* employs to meet the third objective. In introducing the bill for second reading, the minister of finance expressly made this point.¹²⁰ She commented that the act enhances the opportunities for stratas to organize themselves in increasingly complex ways, which means it needs to ensure that a diverse range of interests are given fair representation.

The method that the act uses to give this representation involves the creation of “a mini strata corporation”¹²¹ with its own “mini-government”¹²²—which is a concise way of describing what a section is. Applying this method in the *Strata Property Act* was not a new idea. British Columbia’s strata-property legislation has had provisions enabling sections, in one form or another, for more than 40 years.

Historical development of provisions on sections

Strata Titles Act 1966

British Columbia’s first generation of strata-property legislation¹²³ did not allow the creation of sections.

Strata Titles Act 1974

An enabling provision for the creation of sections first appeared in the second generation of British Columbia’s strata-property legislation.¹²⁴ The 1974 act allowed the creation of a *special-interest section*. The act’s provisions had the following features.

119. *Ibid* at 9923.

120. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36th Parl, 3rd Sess, Vol 12, No 4 (23 July 1998) at 10379 (Hon Joy MacPhail) (“More generally, the new act provides strata corporations with increased options for organizing themselves. For example, because the interests and needs of owners of different types of lots may vary significantly, the act provides strata corporations with the flexibility to create distinct sections to represent these interests.”).

121. *Lim v The Owners, Strata Plan VR2654*, 2001 BCSC 1386 at para 48, 44 RPR (3d) 243, Boyd J.

122. Mangan, *supra* note 9 at 77.

123. *Supra* note 13.

124. *Supra* note 14.

- **Qualifying conditions.** A special-interest section could only be made up of strata-lot owners whose strata lots were “contiguous” or were “separated only by common property” and who “actually share the use of the common property” or “have other interests in common.”¹²⁵
- **Creation.** The procedure for forming a section involved a “petition to the strata council for permission to form a separate section within the strata corporation.”¹²⁶ The strata council was directed to approve the formation of a section if “the petition was signed by seventy-five percent of the owners whose strata lots will be included in the proposed section.”¹²⁷
- **Powers and duties.** In certain specified areas, a section had the same powers and duties as a strata corporation. These powers related to the making of some types of bylaws,¹²⁸ “making and enforcing rules and regulations governing the use of the limited common property,”¹²⁹ and levying and collecting “contributions upon the owners for any expenditure authorized by its members.”¹³⁰ A section also had the power to “acquire personal property,” which, if it were exercised, would bring with it the corresponding duty “with respect to the repair and maintenance of the property.”¹³¹
- **Governance.** A section’s members were allowed to “elect an executive,” but this was not required.¹³² A section could also “call and hold meetings, and pass resolutions.”¹³³
- **Finances.** The act didn’t impose any specific rules on a section’s finances.

125. *Ibid*, s 28 (1).

126. *Ibid*, s 28 (1).

127. *Ibid*, s 28 (2). In granting this approval, the strata council could also, “if appropriate, allocate to the section an area designated as limited common property” (*ibid*, s 28 (2)).

128. See *ibid*, s 28 (4) (sections allowed to make bylaws “restricted to matters of common interest to the section or to matters relating to the limited common property”).

129. *Ibid*, s 28 (4).

130. *Ibid*, s 28 (7) (a)–(b). A section was also authorized “to empower the strata corporation to collect such contributions on behalf of the section in the same manner as it would collect contributions to the common expenses” (*ibid*, s 28 (7) (c)).

131. *Ibid*, s 28 (8).

132. *Ibid*, s 28 (3).

133. *Ibid*, s 28 (3).

- **Cancellation.** The strata council could “dissolve” a section upon “the petition of fifty per cent of the owners within the section” or the passage of “a special resolution of the strata corporation.”¹³⁴ When a section was dissolved, “all bylaws, rules, and regulations of the section are thereupon repealed, and any property acquired by the section is transferred to the strata corporation.”¹³⁵

Strata Titles Amendment Act 1977

Major amendments to the second-generation act were made in 1977.¹³⁶ The 1977 amending act repealed the enabling provision for sections in the 1974 act and replaced it with a new enabling provision.¹³⁷

The 1977 amending act also brought in major changes to the following areas of the law on sections.

- **Qualifying conditions.** The qualifying condition to creating sections based on proximity of strata lots¹³⁸ was abandoned in favour of a condition based on use of strata lots.¹³⁹ The 1977 amending act only allowed sections within a mixed-use strata.¹⁴⁰ The owners of residential strata lots in a mixed-use strata were allowed to create a “separate section” “consisting of all of the residential strata lots in a strata plan.”¹⁴¹ Likewise, all the nonresidential strata lots could form a section.¹⁴²
- **Creation.** The 1977 amending act provided two avenues for forming sections. The first avenue essentially carried forward the procedure involving a petition signed by at least 75 percent of the owners in the proposed section,

134. *Ibid*, s 28 (9).

135. *Ibid*, s 28 (9).

136. *Supra* note 15.

137. See *ibid*, s 23 (repealing section 28 of the 1974 act and replacing it with a new section 28).

138. See 1974 act, *supra* note 14, s 28 (1).

139. See 1977 amending act, *supra* note 15, s 28 (1)-(2).

140. See *ibid*, s 28 (1)-(2).

141. *Ibid*, s 28 (1).

142. See *ibid*, s 28 (2).

which was found in the 1974 act.¹⁴³ But the 1977 amending act also allowed an owner-developer to form sections.¹⁴⁴

- **Powers and duties.** The 1977 amending act contained an express declaration that a section lacked authority to “enter into a contract in the name of the strata corporation,” and provided that “the strata corporation has no liability for debts incurred or contracts made by the section.”¹⁴⁵

The 1977 amending act largely maintained the rules on section governance, finances, other powers and duties, and cancellation found in the 1974 act.

Condominium Act

In 1979, the *Strata Titles Act* was renamed the *Condominium Act*.¹⁴⁶ The act, under that title, remained in force through the 1980s and 1990s until it was repealed and replaced by the *Strata Property Act*.

Apart from some non-substantive drafting changes, the *Condominium Act*'s provisions on sections¹⁴⁷ remained the same as those found in the 1977 amending act.

Strata Property Act

Initial impressions

British Columbia's third generation of strata-property legislation expanded the rules on sections, going from two legislative provisions in the *Condominium Act* to nine in the *Strata Property Act*.¹⁴⁸ The act brought about a number of significant changes in its more-extensive legal framework for sections. These changes may be best appreciated by comparing the *Strata Property Act*'s rules to those of its predecessors in the six areas noted earlier: (1) qualifying conditions; (2) creation; (3) powers and duties; (4) governance; (5) finances; (6) cancellation.

143. See *ibid*, s 28 (4).

144. See *ibid*, s. 28 (5) (“The owner-developer may, as the owner of all strata lots, cause the strata corporation to form the separate sections referred to in subsection (1) or (2), or both.”). Notice that this contemplates the formation of sections after the strata plan is filed in the land title office. If the owner-developer took this step “within one year of the date the strata plan is filed,” then it would require the consent of the superintendent of insurance (*ibid*, s 28 (6)).

145. *Ibid*, s 28 (13).

146. *Supra* note 16.

147. See *supra* note 116, ss 51–52.

148. *Supra* note 1, ss 190–98.

Qualifying conditions

One of the most-noticed changes for sections in the *Strata Property Act* was the expansion of the qualifying conditions for stratas to create sections.¹⁴⁹ The *Condominium Act* only permitted sections in a mixed-use strata. The *Strata Property Act* did not carry forward this condition. In its place, the *Strata Property Act* allows strata properties to create sections if any of three conditions can be met. These three conditions relate to creating sections to represent “the different interests of”:

- owners of residential strata lots and owners of nonresidential strata lots,
- owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or
- owners of different types of residential strata lots.¹⁵⁰

The word *types* in the last bullet point has the potential to confuse readers. It doesn’t refer to the types that are the subject of the next chapter in this consultation paper. Unfortunately, the law uses the same word for two different concepts.

Types, as used in this provision, is actually a term of art, with a limited application to the qualifying conditions for creating sections.¹⁵¹ The word is defined in the regulation.¹⁵² Types of strata lots, for the purpose of creating different sections of residential strata lots, are:

- apartment-style strata lots;
- townhouse-style strata lots;
- detached houses.¹⁵³

149. See e.g. Elizabeth (Lisa) M Vogt, “Standard Bylaws and How They Should Be Amended,” in Continuing Legal Education Society of British Columbia, ed, *Strata Property Act: Materials Prepared for the Continuing Legal Education Seminar, The New Strata Property Act, Held in Vancouver, B.C. on May 11, 2000* (Vancouver: Continuing Legal Education Society of British Columbia, 2000) 3.1 at 3.1.06 (“The ability of a strata corporation to create separate sections has been significantly expanded.”).

150. *Supra* note 1, s 191 (1).

151. See *ibid*, s 191 (2) (“strata lots are different types if they fall within the criteria set out in the regulations”).

152. See *supra* note 2.

153. *Ibid*, s 11.1.

Despite the act's liberalizing of the conditions for creating sections, it's still worth bearing in mind that the "ability to create sections is not unfettered."¹⁵⁴ If the bylaws that attempt to create sections for a strata property don't meet one of the qualifying conditions, then the likely result would be the striking down of those bylaws.¹⁵⁵

Creation

INTRODUCTION

The *Strata Property Act* carries forward the two avenues for creating sections found in the *Condominium Act*. Sections can be created either by the owner-developer or by the strata corporation. But in each case the *Strata Property Act* includes some significant changes.

Commentators have also noted a possible third procedure for creating sections under the *Strata Property Act*: by court order.

SECTIONS CREATED BY THE OWNER-DEVELOPER

The main difference between the *Strata Property Act* and the *Condominium Act* involves the time when an owner-developer is allowed to create sections.

The *Strata Property Act* limits the time in which an owner-developer may create sections. It can only be done "at the time the strata plan is deposited by filing in the land title office."¹⁵⁶ The procedure for creating sections involves filing with the strata plan "bylaws that provide for the creation and administration of each section."¹⁵⁷ And the proposed bylaws must be included in the disclosure statement required by the *Real Estate Development Marketing Act*.¹⁵⁸

154. Baker & Walker, *supra* note 91 at 1.1.5.

155. See *ibid* at 1.1.8 ("creating sections based on distinctions not recognized by the strata property legislation carries the risk that the bylaws could later be set aside as unenforceable").

156. *Supra* note 1, s 192. Under the *Condominium Act*, *supra* note 16, s 51 (5), the equivalent timing rule limited the owner-developer's power to creating sections to when it was "owner of all strata lots."

157. *Supra* note 1, s 192 (a). The owner-developer is also allowed, at this time, to file "any resolutions to designate limited common property, in accordance with section 74, for the exclusive use of all the strata lots in a section" (*ibid*, s 192 (b)).

158. SBC 2004, c 41.

Consultation Paper on Complex Stratas

SECTIONS CREATED BY THE STRATA CORPORATION

The *Strata Property Act* introduces new voting thresholds for the creation of sections by a strata corporation. The act also requires the approval of both the voters in a proposed section and the general pool of voters in the strata corporation.

A strata corporation may only create sections by adopting a resolution passed

- by a 3/4 vote, and
- by a sectional 3/4 vote.¹⁵⁹

The legislation goes on to define “sectional 3/4 vote” as meaning “a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting.”¹⁶⁰

The *Strata Property Act* also adds notice requirements and procedural protections to its provisions on a strata corporation creating sections.¹⁶¹

SECTIONS CREATED BY COURT ORDER

Since the *Strata Property Act* came into force in 2000, there have been a number of disputes over cost sharing that have culminated in applications to the supreme court

159. *Ibid*, s. 193 (3). The change in voting threshold might not be immediately apparent. The *Condominium Act* required a petition “signed by 75% or more of the owners whose strata lots are included in the proposed separate section” (*supra* note 16, s 51 (4)). A resolution passed by a 3/4 vote, in contrast, requires “a vote in favour of a resolution by at least 3/4 of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting” (*supra* note 1, s 1 (1) “3/4 vote”). In other words, passage of a resolution by a 3/4 vote is measured against the votes actually cast at a general meeting, which may result in the resolution’s passage even though it is not affirmatively supported by 75 percent of the total eligible voters in the strata corporation.

160. *Strata Property Act*, *ibid*, s 193 (3.1) (as added by *Natural Gas Development Statutes Amendment Act, 2015*, *supra* note 6, s 46).

161. See *supra* note 1, s 193 (1)–(2). If it wants to create sections, a “strata corporation must hold an annual or special general meeting to consider” this change (*ibid*, s 193 (1)). The “notice of meeting must include (a) a resolution to amend the bylaws to provide for either the creation and administration of each section or the cancellation of the sections, and (b) any resolutions to designate limited common property, in accordance with section 74, for the exclusive use of all the strata lots in a section or to remove a designation in accordance with section 75” (*ibid*, s 193 (2)).

for an order to create sections in the strata corporation at issue.¹⁶² The foundation of these applications is the court's power to prevent or remedy significantly unfair acts.¹⁶³

Even though the court's "power [to create sections] has been used infrequently,"¹⁶⁴ it is still worthwhile to note how the court approaches such cases. This approach was spelled out in *Poloway*, a recent judgment of the supreme court.¹⁶⁵

In the court's view, the overriding issue in these cases is whether it is significantly unfair to require a group of owners to contribute to the cost of some major expense in accordance with the act's scheme of sharing expenses based on strata lots' unit entitlements or with some other scheme adopted by the strata corporation.¹⁶⁶ Four factors typically need to be considered in answering this overriding issue.

- "First, it is important to bear in mind the scheme of the *Strata Property Act* when determining whether past or proposed actions are significantly unfair. . . . [T]he general rule is 'you are all in it together' and that general rule cannot and ought not be lightly displaced."¹⁶⁷
- "A second matter of importance to the assessment of whether conduct is significantly unfair is the historical approach to similar issues. If the strata corporation has approached similar issues, such as the treatment of expenses, in one way and then changes its approach to the substantial detriment of

162. See *Alvarez*, *supra* note 84; *Large v The Owners, Strata Plan No 601*, 2005 BCSC 1128, 45 BCLR (4th) 345; *Chow v The Owners, Strata Plan LMS 1277*, 2006 BCSC 335, 54 BCLR (4th) 380 [*Chow* (2006)]; *Poloway v Owners, Strata Plan K692*, 2012 BCSC 726, 19 RPR (5th) 295 [*Poloway*].

163. See *supra* note 1, s 164 ("(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting. (2) For the purposes of subsection (1), the court may (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes, (b) vary a transaction or resolution, and (c) regulate the conduct of the strata corporation's future affairs.").

164. *Baker & Walker*, *supra* note 91 at 1.1.4.

165. See *supra* note 162.

166. See *ibid* at para 66.

167. *Ibid* at para 54, Barrow J.

one group or type of strata lot owner, that will often be cogent evidence of unfairness.”¹⁶⁸

- “A third factor to be considered is other conduct on the part of the Strata Corporation. This may be relevant to both the threshold question of whether there has been significant unfairness and the question of the appropriate remedy if significant unfairness is found.”¹⁶⁹
- “The last and arguably the most important consideration in the context of this case is the sheer magnitude of the expense and the degree to which it may be said to benefit [one group of owners] as opposed to [another group of owners].”¹⁷⁰

Although an order creating sections wasn’t granted in *Poloway*, a similar order has been granted in at least one other case.¹⁷¹ So the court appears to be a viable, though rarely used, avenue to the creation of sections.

Powers and duties

Even though the *Strata Property Act* characterizes a section as “a corporation,”¹⁷² it is a particularly unusual and potentially limited type of corporation. Its corporate status only applies “[w]ith respect to a matter that relates solely to the section.”¹⁷³ Strata-lot owners in sections pay strata-corporation fees and section fees, must comply with strata-corporation bylaws and section bylaws, and elect both a strata-corporation council and a section executive. This is in contrast to the strata corporation, which the act declares to have “the power and capacity of a natural person of full capacity.”¹⁷⁴

But within its restricted sphere a section is equated with the strata corporation. The act provides that a section “has the same powers and duties as the strata corporation”

168. *Ibid* at para 55.

169. *Ibid* at para 59.

170. *Ibid* at para 63.

171. See *Chow* (2006), *supra* note 162 at para 108.

172. *Supra* note 1, s 194 (2).

173. *Ibid*, s 194 (2).

174. *Ibid*, s 2 (2).

Consultation Paper on Complex Stratas

- to establish its own operating fund and contingency reserve fund for common expenses of the section, including expenses relating to limited common property designated for the exclusive use of all the strata lots in the section,
- to budget and require section owners to pay strata fees and special levies for expenditures the section authorizes,
- to sue or arbitrate in the name of the section,
- to enter into contracts in the name of the section,
- to acquire and dispose of land and other property in the name of or on behalf of the section, and
- to enforce bylaws and rules.¹⁷⁵

A section doesn't have the authority to "enter into a contract, or sue or arbitrate, in the name of the strata corporation."¹⁷⁶ The strata corporation "has no liability for contracts made, or debts or legal costs incurred, by [a] section."¹⁷⁷

Governance

ADMINISTRATION

Under the *Condominium Act*, sections had the option to form an executive. The *Strata Property Act* takes this option away, making it mandatory for sections to have an executive.¹⁷⁸ A section's executive essentially plays the same role as the strata council for the broader strata corporation.¹⁷⁹

In addition to electing the executive, the section's eligible voters also have a part in the section's governance. They "may call and hold meetings and pass resolutions in the same manner as eligible voters of the strata corporation."¹⁸⁰

In fact, this legislative provision may understate matters. Section powers and duties, such as establishing operating and contingency-reserve funds, setting strata fees,

175. *Ibid*, s 194 (2).

176. *Ibid*, s 194 (3).

177. *Ibid*, s. 194 (3).

178. See *ibid*, s 196 (2).

179. See *ibid*, s 196 (2) ("the section executive has the same powers and duties with respect to the section as the strata corporation's council has with respect to the strata corporation").

180. *Ibid*, s 196 (1).

and adopting a budget, as well as the requirement to elect an executive, call for the holding of, at a minimum, an annual general meeting.¹⁸¹

BYLAWS AND RULES

The foundational document for a section is the “bylaws that provide for the creation and administration” of the section.¹⁸² After its creation, a section is also able to amend its strata corporation’s bylaws, but only “if the bylaw amendment is in respect of a matter that relates solely to the section.”¹⁸³

The general rule is that “an amendment to the bylaws respecting a matter that relates solely to the section must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting of the section.”¹⁸⁴ Sections that are “composed entirely of nonresidential strata lots” may vary this general rule and establish “a different voting threshold” for approving bylaw amendments.¹⁸⁵

The section executive is empowered to “make rules governing the use, safety and condition of”:

- land and other property acquired under section 194 (2) (e), and
- limited common property designated for the exclusive use of all the strata lots in the section.¹⁸⁶

The procedural and notice requirements applicable to strata-corporation rules also apply to rules made by a section executive.¹⁸⁷

181. It could be argued that a section should be able to waive the requirement to hold an annual general meeting by extension of the rule that applies to strata corporations. See *ibid*, s 41. If this theory were to hold true, then all the eligible voters in the section would have to “waive, in writing, the holding of the meeting and consent, in writing, to resolutions that (a) approve the budget for the coming fiscal year, (b) elect [an executive] by acclamation, and (c) deal with any other business” (*ibid*, s 41 (1)).

182. *Ibid*, ss 192 (a), 193 (2) (a).

183. *Ibid*, s 197 (2). The general rule is that the “strata corporation’s bylaws apply to the section unless they have been amended by the section” (*ibid*, s 197 (1)).

184. *Ibid*, s 197 (3).

185. *Ibid*, s 197 (3.1). This “different voting threshold” must itself be “provided for in the bylaws of the section” if it is to be effective (*ibid*, s 197 (3.1) (b)).

186. *Ibid*, s 197 (4).

187. See *ibid*, s 125 (providing that rules “be set out in a written document that is capable of being photocopied” and to be ratified by a majority vote at next annual general meeting or special gen-

Finances

The act sets out a clear formula for sharing “expenses of the strata corporation that relate solely to the strata lots in a section.”¹⁸⁸ Under this formula, expenses are “shared by the owners of strata lots in the section and each strata lot’s share of a contribution to the operating fund and contingency reserve fund is calculated as follows”:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots in section}} \times \text{total contribution}^{189}$$

As was the case for sharing expenses among the broader strata corporation based on unit entitlement, this formula represents a general rule that may be displaced in specific cases. Some of these cases are specified in the regulation, which sets out formulas applicable to sharing operating expenses for limited common property and types of strata lots in sections¹⁹⁰ and to sharing operating expenses and special levies relating to strata lots in sections.¹⁹¹

The general rule is also “subject to section 100,” which means it may be displaced if the strata corporation passes a resolution to that effect by a unanimous vote.¹⁹²

A judgment “against the strata corporation [that] relates solely to the strata lots in a section” is a shared expense of the section.¹⁹³ A given strata lot’s share of such a judgment is calculated in accordance with the formula set out above, “and an owner’s liability is limited to that proportionate share of the judgment.”¹⁹⁴

eral meeting, that owners and tenants be informed of “any new rules as soon as feasible,” and that a bylaw “prevails” over any rule it is in conflict with).

188. *Ibid*, s 195.

189. *Ibid*, s 195.

190. See *supra* note 2, s 11.2.

191. See *ibid*, s 11.3.

192. See *supra* note 1, s 195. See also above at 26 (further discussion of section 100).

193. *Supra* note 1, s 198 (1).

194. *Ibid*, s 198 (2).

Cancellation

Cancelling a section requires essentially the same procedure as a strata corporation uses to create a section. First, “the strata corporation must hold an annual or special general meeting to consider the . . . cancellation.”¹⁹⁵ The notice of this meeting “must include a resolution to amend the bylaws to provide for” cancelling a section.¹⁹⁶ This resolution “must be passed”

- by a 3/4 vote, and
- by a sectional 3/4 vote.¹⁹⁷

Since sections are characterized as corporations by the *Strata Property Act*, cancelling a section could be seen as the equivalent of dissolving a corporation. But, unlike corporate legislation, the *Strata Property Act* doesn’t address the implications of cancellation on issues such as the disposition of the section’s property or responsibility for any section liabilities.

Sections and their equivalents in other jurisdictions

Introduction

Comparisons with other jurisdictions may help to shed light on British Columbia’s legislation on sections and may point to potential reforms for that legislation. But there aren’t many jurisdictions that employ a legislative concept that is directly comparable to British Columbia’s sections. The following parts of this chapter look at those jurisdictions with comparable legislation in the rest of Canada, the United States, and Australia.

Saskatchewan

Saskatchewan is the only other Canadian jurisdiction to have anything similar to sections. Saskatchewan’s act allows for the creation of *sectors*.¹⁹⁸ Sectors are relative newcomers on the scene in Saskatchewan, having only been allowed since 2010.¹⁹⁹

195. *Ibid*, s 193 (1).

196. *Ibid*, s 193 (2).

197. *Ibid*, s 193 (3). A “sectional 3/4 vote” is defined as “a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting” (*ibid*, s 193 (3.1)).

198. See *The Condominium Property Act, 1993*, SS 1993, c 26.1, s 2 (1) (y.1) (“ ‘sector’ means a sector of a corporation established in the bylaws of that corporation made pursuant to the authority

The primary reason for allowing sectors appears to be to ensure that complex condominiums with diverse owners having different interests are given tools to ensure that all interests are fairly represented. In this respect, Saskatchewan's sectors are similar in purpose to British Columbia's sections. But there are also some noteworthy differences in Saskatchewan's approach to sectors, which can be seen by looking at the six areas that were previously discussed in connection with British Columbia's legislation.

- **Qualifying conditions.** Although sectors were apparently introduced in Saskatchewan as a means to foster mixed-use condominiums,²⁰⁰ nothing in the legislation limits sectors to mixed-use condominiums. In fact, unlike British Columbia, Saskatchewan doesn't place any qualifying conditions on the creation of sectors. The enabling provision in Saskatchewan's act simply allows for the adoption of bylaws "for the establishment of sectors within a corporation, the allocation of units, common facilities and common property to a sector, and the control, management, administration, use and enjoyment of the units, common property and common facilities within a sector."²⁰¹
- **Creation.** Similar to British Columbia, Saskatchewan allows the creation of sectors by a developer or by the condominium corporation. But if the condominium corporation wants to create sectors, then it must meet a higher voting threshold than is required in British Columbia. This threshold is set at either "unanimous approval"²⁰² or "80% approval."²⁰³ If the bylaw creat-

conferred in clause 47 (1) (m.1)").

199. See *The Condominium Property Amendment Act, 2009*, SS 2009, c 10, s 18 (in force 5 June 2010).

200. See Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 26th Leg, 2nd Sess, No 55A (29 April 2009) at 2904 (Hon Don Morgan).

201. *Supra* note 198, s 47 (1) (m.1).

202. *Supra* note 198, s 47.1 (4) (a) (bylaw creating sectors may be made, amended, or repealed "by a resolution that receives unanimous approval: (i) at a properly convened meeting of a corporation, from 100% of owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation and who vote, in person or by proxy, in favour of the resolution; (ii) by the signature on the resolution of 100% of owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation; or (iii) from 100% of owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation by some combination of the processes set out in subclauses (a)(i) and (ii)").

203. *Ibid*, s 47.1 (4) (b) (bylaw creating sectors may be made, amended, or repealed "by a resolution that receives 80% approval: (i) at a properly convened meeting of a corporation, from 80% of

ing sectors is approved by a resolution meeting the 80-percent threshold, then the dissenting owners have a right to apply to court “to object” to the resolution.²⁰⁴ The court may confirm or order changes to the proposed by-law.²⁰⁵

- **Powers and duties.** Saskatchewan’s legislation allows for a general delegation, in the bylaws creating a sector, of “anything required or permitted to be done by the corporation pursuant to this Act.”²⁰⁶ The legislation specifically allows for the bylaws to “provide for the assessment and collection of contributions towards the common expenses” of the sector.²⁰⁷ This point is significant because Saskatchewan gives sectors a wider range of authority over property within the sector than is afforded to British Columbia sections. Bylaws creating sectors may “provide for the management, control, administration, use and enjoyment of the units, common property and common facilities in the sector”²⁰⁸ and “provide for the maintenance of the common property, common facilities and services units in the sector.”²⁰⁹ *Common facilities* and *common property* are both defined terms under the Saskatchewan act,²¹⁰ with the latter having a meaning similar to common property under the *Strata Property Act*. Although the words *provide for* can

owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation and who vote, in person or by proxy, in favour of the resolution; (ii) by the signature on the resolution of 80% of owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation; or (iii) from 80% of owners of units who are entitled to exercise the powers of voting conferred by this Act or the bylaws of the corporation by some combination of the processes set out in subclauses (b)(i) and (ii)”).

204. *Ibid*, s 47.1 (6) (“An owner may apply to the court within 30 days after being served with the notice mentioned in subsection (5) to object to the resolution.”).
205. *Ibid*, s 47.1 (8) (“On an application pursuant to subsection (6), the court may: (a) accept any evidence that the court considers appropriate; and (b) make one or more of the following orders: (i) an order confirming the bylaw; (ii) an order directing the corporation to file the bylaws that are the subject of the resolution, including ordering the corporation to make any changes to those bylaws before filing as the court may direct; (iii) any other order that the court considers fair and equitable.”).
206. *Ibid*, s 47.1 (1) (g).
207. *Ibid*, s 47.1 (1) (d).
208. *Ibid*, s 47.1 (1) (a).
209. *Ibid*, s 47.1 (1) (b).
210. See *ibid*, ss. 2 (1) (g) (“ ‘common facilities’ means improvements on the common property and includes any laundry room, playground, swimming pool, recreation centre, clubhouse, tennis court and landscaping”), 2 (1) (h) (“ ‘common property’ means the part of the land and buildings included in a condominium plan that is not included in any unit shown in the condominium plan”).

be somewhat ambiguous, it appears that these provisions allow for bylaws assigning responsibility for repairs to common property to a sector. This is in contrast to the situation in British Columbia, where the legislation only refers to “resolutions to designate *limited* common property . . . for the exclusive use of all the strata lots in a section”²¹¹ and the case law has held that the act does not make a section responsible for repairs to common property within a section.²¹²

- **Governance.** Saskatchewan’s legislation doesn’t assign corporate status to a sector. In comparison to British Columbia’s *Strata Property Act*, it takes a much less directive approach to sector governance. The legislation simply enables the bylaws creating a sector to provide for meetings of sector owners,²¹³ voting at those meetings,²¹⁴ and constituting a form of executive.²¹⁵ These bylaws may also provide a process for the “making” and “enforcement” of “sector bylaws.”²¹⁶
- **Finances.** Saskatchewan’s legislation doesn’t contain any specific rules relating to sector finances.
- **Cancellation.** Cancelling a sector under Saskatchewan’s legislation involves repealing the bylaws that enabled creation of the sector. The procedure is the same as the one described above for creating a sector. The key point of this procedure is that it requires approval by a voting threshold that is set at either “unanimous approval”²¹⁷ or “80% approval.”²¹⁸

211. See *supra* note 1, ss 192 (b), 193 (2) (b) [emphasis added].

212. See *Yang v The Owners, Strata Plan LMS 4084*, 2010 BCSC 453 at para 26, 90 RPR (4th) 111, Wedge J (“There is no reference in the Act to common property of a section, as I have noted earlier, only limited common property. Accordingly, sections cannot set up reserve funds for the purpose of maintaining or repairing common property. The Act does not refer to the obligation of a section to repair and maintain common property as distinct from limited common property. Reading the Act as a whole, it appears that common property of the strata corporation remains the responsibility of the strata corporation to maintain.”).

213. See *supra* note 198, s 47.1 (1) (f) (i).

214. See *ibid*, s 47.1 (1) (f) (ii).

215. See *ibid*, s 47.1 (1) (f) (iv) (allowing for “the delegation to persons selected by owners of units constituting a sector of powers of the board with respect to the enforcement of bylaws in relation to units, common property and common facilities within the sector”).

216. *Ibid*, s 47.1 (1) (f) (iii)–(iv).

217. *Ibid*, s 47.1 (4) (a).

218. *Ibid*, s 47.1 (4) (b). See also *ibid*, s 46 (0.1) (providing that general rules on the making, amending, and repealing of bylaws don’t apply to bylaws creating sectors).

Other Canadian jurisdictions

No other Canadian jurisdiction has legislation providing for anything similar to British Columbia's sections or Saskatchewan's sectors. This doesn't mean that mixed-use stratas aren't found in other parts of the country or that disputes over cost sharing in complex stratas never appear elsewhere. It means that other jurisdictions may take other approaches in addressing those issues.

Ontario, to take one example, does not allow sections, but does allow for greater flexibility in cost sharing. Instead of the firm commitment to a general rule based on sharing expenses in accordance with unit entitlement, Ontario permits developers to craft individual approaches in a condominium's declaration. There seems to be a greater emphasis on carving out expenses that can be metered or attributed to a single user,²¹⁹ something which a leading case appears to encourage.²²⁰

Other Canadian reform projects

It is worthwhile noting that a number of Canadian jurisdictions are currently reviewing or have recently completed reviewing their condominium legislation.²²¹ None of these reform projects raises the prospect of implementing sections.

219. See Audrey M Loeb, *Condominium Law and Administration*, 2nd ed, vol 1 (Toronto: Carswell, 1998) (loose-leaf release 2010–1) at 7§6(a) (“In a residential complex, the degrees of services utilized by the various residential unit owners are substantially identical. However, in a commercial condominium context, there is a great variation in the types and extent of services utilized by various unit owners. It is mandatory in a commercial condominium complex that the declarant review in detail all relevant aspects and servicing details for the condominium development. . . . As a general rule, those services whose costs vary from unit to unit and would apply only to a particular unit should not be classified as common expenses; they should be borne and paid for by the owner of the unit.”).

220. See *York Region Condominium Corp No 771 v Year Full Investment (Canada) Inc* (1993), 12 OR (3d) 641 at 645, 100 DLR (4th) 449 (CA), the court (“[H]aving regard to the fact that the development has substantial numbers of units of mixed uses, that the corporation contemplated that excess water use would be paid for separately by retail unit owners, that the intent of a declaration is to apportion common expenses amongst unit holders in percentages as close as possible to the percentage of use made and enjoyment received by each unit holder from the services and charges included in the common expenses, the words ‘unless separately metered for each unit’ should be interpreted to mean ‘unless separately metered for any unit’ rather than ‘unless separately metered for each and every unit.’ On this basis, the expense for excessive water usage by a unit owner does not form part of the common expenses.” [emphasis in original]).

221. See Public Policy Forum, *Growing Up: Ontario's Condominium Communities Enter a New Era: Condominium Act Review Stage Two Solutions Report* (Ottawa: Public Policy Forum, 2013); Public Policy Forum, *Ontario's Condominium Act Review: Stage One Findings Report* (Ottawa: Public Policy Forum, 2013); Service Alberta, *Condominium Property Act Review: Consultation Analysis Re-*

United States of America

In the United States, strata-property law is largely found in state statutes. This consultation paper doesn't survey the legislation in force in all fifty states. Instead, it notes a representative law-reform example, the Uniform Law Commission's Uniform Common Interest Ownership Act (UCIOA).²²²

UCIOA doesn't contain enabling provisions for the creation of sections. But UCIOA's drafters pointed to its liberal provisions on voting rights as a means of addressing problems that may arise from different interests in a mixed-use common-interest community.

UCIOA allows for two voting mechanisms that are relevant here. The first enables a common-interest community's declaration to enable "different allocations of votes . . . to the units on particular matters specified in the declaration."²²³ The commentary provides an example of how such a provision, which it admits "represents a significant departure from the practice in most States,"²²⁴ would work in a mixed-use common-interest community:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners pay a much larger share than their proportion of the total units, the vote of commercial unit owners might be increased so that they exceed the number of votes the residential owners hold.²²⁵

The second voting mechanism that may be used to address cost-sharing issues is class voting.²²⁶ Class voting is narrowly tailored only to specific issues that affect the class.²²⁷ It would allow a class of voters to deal with expenditures that relate just to

port (June 2013); Yukon, Department of Justice, *The Condominium Act Review: A Discussion Paper* (Fall 2012); Newfoundland and Labrador, Government Services, *Condominium Act of Newfoundland and Labrador: Consultation Discussion Paper* (2008).

222. See, online: Uniform Law Commission <[www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20\(2008\)](http://www.uniformlaws.org/Act.aspx?title=Common%20Interest%20Ownership%20Act%20(2008))>.

223. UCIOA, § 2-107 (d) (i) (2008).

224. UCIOA, § 2-107, comm 7 (2008).

225. UCIOA, § 2-107, comm 7 (2008).

226. UCIOA, § 2-107 (d) (iii) (2008) (allowing "for class voting on specified issues affecting the class if necessary to protect valid interests of the class").

227. See UCIOA, § 2-107, comm 8 (2008) ("To prevent abuse of class voting by the declarant, subsec-

their class, while the broader common-interest community would deal with community-wide expenditures.²²⁸

Finally, it's worth noting that UCIOA's rules on the applicability of its provisions provide that many mixed-used developments are not subject to UCIOA, unless they specifically decide to opt into it.²²⁹ A comment on this provision notes that the "default rule is nonapplicability,"²³⁰ which means that for many mixed-use common-interest communities issues concerning cost sharing and property control will be dealt with under a contractual, rather than a statutory, framework.

Australia

None of Australia's strata-property acts contains provisions on sections just like those found in British Columbia's act (in fact, none even uses the word *section*.) But many of these acts tackle issues concerning cost sharing and control of property in a manner that bears some resemblance to British Columbia's approach. Three jurisdictions—Tasmania, the Australian Capital Territory, and Victoria—have legislation that allows similar concepts to apply also to single-building strata developments.

TASMANIA AND THE AUSTRALIAN CAPITAL TERRITORY

Strata-property legislation in the state of Tasmania²³¹ and in the Australian Capital Territory²³² permits the division of a body corporate "into 2 or more separate bodies corporate."²³³ (A *body corporate* is the Australian equivalent of a strata corporation.)

tion (d) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.").

228. See UCIOA, § 2-107, comm 8 (2008) ("Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting only the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.").

229. See UCIOA, § 1-207 (d) (2008) ("A common interest community that contains units restricted exclusively to nonresidential purposes and other units that may be used for residential purposes is not subject to this [act] unless the units that may be used for residential purposes would comprise a common interest community that would be subject to this [act] in the absence of nonresidential units or the declaration provides that this [act] applies as provided in subsection (b) or (c)." [bracketed words in original]).

230. See UCIOA, § 1-207, comm 3 (2008).

231. See *Strata Titles Act 1998* (Tas).

232. See *Community Title Act 2001* (ACT).

233. *Strata Titles Act 1998* (Tas), s 72 (1); *Community Title Act 2001* (ACT), s 33 (1).

This legislation has a number of interesting contrasts with British Columbia’s provisions on sections.

- **Qualifying Conditions.** The Australian legislation does not require any qualifying conditions for the division of a body corporate—the resulting bodies corporate don’t have to correspond to different uses in the strata or relate to contiguous strata lots.
- **Creation.** There is a much higher voting threshold that must be met to divide a body corporate—both acts require a “unanimous resolution of the body corporate”²³⁴ to effect the division.²³⁵
- **Powers and duties.** The Australian legislation relies heavily on the body corporate’s “constituent documents”²³⁶ to define how the divided bodies corporate are to function and what their powers and duties will be. The acts specifically require that those constituent documents:
 - must define the functions and responsibilities of each body corporate and, in doing so, may create an administrative hierarchy with one or more bodies corporate at each level of the hierarchy; and
 - must provide for the resolution of disputes between the bodies corporate; and
 - must ensure that the powers of a body corporate under this Act insofar as they relate to a lot within the scheme are directly exercisable in relation to each lot within the scheme by one, and only one, body corporate.²³⁷
- **Governance.** The bodies corporate that result from this process of division retain their corporate status.²³⁸ Because the legislation characterizes divid-

234. *Strata Titles Act 1998* (Tas), s 72 (1); *Community Title Act 2001* (ACT), s 33 (1).

235. See *Strata Titles Act 1998* (Tas), ss 3 “unanimous resolution” (“unanimous resolution of a body corporate means a resolution passed at a duly convened meeting of the members of the body corporate against which no member of the body corporate casts a dissentient vote (at the meeting or later as allowed by this Act)”), 78 (1) (“If a unanimous resolution is required for a particular purpose under this Act or the constituent documents of the body corporate, a member of the body corporate may vote on the resolution—(a) at the general meeting of the body corporate at which the resolution is proposed; or (b) by giving the body corporate written notice of the member’s vote within 28 days after the date of that meeting.”); *Community Title Act 2001* (ACT), dictionary (“unanimous resolution, of a body corporate, means a resolution passed at a properly called meeting of the members of the body corporate against which no member of the body corporate casts a dissenting vote”).

236. See *Strata Titles Act 1998* (Tas), s 52 (3) (“The constituent documents for the managing body corporate are the documents setting out—(a) the basis of membership of the body corporate; and (b) the powers and functions of the body corporate; and (c) how its affairs are to be administered.”).

237. *Strata Titles Act 1998* (Tas), s 72 (7). See also *Community Title Act 2001* (ACT), s 33 (6).

ed bodies corporate as fully fledged bodies corporate, and not (as in British Columbia) as distinct mini corporations, it doesn't set out many governance rules specific to divided bodies corporate.²³⁹

- **Finances.** Neither act contains any rules specifically directed at the finances of stratas with two or more bodies corporate.
- **Cancellation.** Neither act directly addresses cancellation of a body corporate. But both acts can be seen as indirectly addressing this issue by allowing two or more bodies corporate to merge.²⁴⁰ Bodies corporate could merge for any number of reasons, one of which could be to deal with any unwanted or spent bodies corporate. After their merger, any "rights and liabilities" of the merging bodies corporate "attach to the body corporate formed by the merger."²⁴¹

VICTORIA

The Australian state of Victoria's legislation²⁴² (which is called the *Subdivision Act*) takes a somewhat different approach to these issues. The *Subdivision Act* allows a plan²⁴³ to "provide for the creation of one or more owners corporations consisting of the owners of specified lots."²⁴⁴ Owners corporations may be either

- an unlimited owners corporation, which applies to an entire plan;²⁴⁵ or
- a limited owners corporation, which applies to a defined part of a plan.²⁴⁶

238. See *Strata Titles Act 1998* (Tas), s 71 (3); *Community Title Act 2001* (ACT), s 31.

239. A rare example of a specific rule is found in *Strata Titles Act 1998* (Tas), s 74 (2) (constituent documents must be used to determine "the membership and the voting rights of the members of a body corporate" when a strata has two or more bodies corporate).

240. See *Strata Titles Act 1998* (Tas), s 72 (3); *Community Title Act 2001* (ACT), s 33 (3).

241. *Strata Titles Act 1998* (Tas), s 72 (4); *Community Title Act 2001* (ACT), s 33 (4).

242. See *Subdivision Act 1988* (Vic).

243. This term is broadly defined in the Victoria act to include all sorts of subdivision and strata plans. See *Subdivision Act 1988* (Vic), s 3 (1) "plan."

244. *Subdivision Act 1988* (Vic), s 27 (1). An owners corporation must be created if the plan "contains common property," *i.e.*, if it is a strata plan. See *Subdivision Act 1988* (Vic), s 27A.

245. See *Subdivision Act 1988* (Vic), s 27B (1). This provision actually doesn't define *unlimited owners corporation* in positive terms; instead it just says that "[a]n unlimited owners corporation is an owners corporation that is not a limited owners corporation."

246. See *Subdivision Act 1988* (Vic), s 27C (1) ("A limited owners corporation is an owners corporation specified on a plan as a limited owners corporation.").

A limited owners corporation is analogous to a British Columbia section.

- **Qualifying Conditions.** The *Subdivision Act* does not set any qualifying conditions on the creation of a limited owners corporation. The legislation does require that the strata “plan must be accompanied by a document specifying the purposes” of the unlimited owners corporation and any limited owners corporation.²⁴⁷
- **Creation.** The creation of these owners corporations is linked to filing or amending the strata plan. The *Subdivision Act* contains no specific enabling provisions for strata-lot owners to create a limited owners corporation.
- **Powers and duties.** The *Subdivision Act* relies heavily on the parties involved in crafting the strata plan to define the purposes of the various owners corporations and to specify their respective spheres of authority.²⁴⁸ Strata-lot owners can amend these statements of purposes by way of a special resolution.²⁴⁹ Although the *Subdivision Act* requires that a strata lot “must not be affected by more than one unlimited owners corporation,”²⁵⁰ it is possible for a strata lot to be subject to one unlimited owners corporation and one or more limited owners corporations.²⁵¹
- **Governance, finances, and cancellation.** The *Subdivision Act* doesn’t set out any specific rules for the governance, finances, and cancellation of a limited owners corporation.

REFORM PROPOSALS IN OTHER AUSTRALIAN JURISDICTIONS

Like Canada, Australia has seen a large number of projects in recent years tackling reform of strata-property legislation.²⁵² One of these projects, based in Western Aus-

247. *Subdivision Act 1988* (Vic), ss 27B (2), 27C (2).

248. See *Subdivision Act 1988* (Vic), s. 27C (4)–(5).

249. See *Subdivision Act 1988* (Vic), s. 27H (3).

250. *Subdivision Act 1988* (Vic), s. 27D (1).

251. See *Subdivision Act 1988* (Vic), s. 27D (2).

252. See e.g. New South Wales, *Strata & Community Title Law Reform Position Paper* (Parramatta: NSW Fair Trading, 2013); Queensland University of Technology Law, Commercial and Property Law Research Centre, *Lot Entitlements under the Body Corporate and Community Management Act* (Queensland Government Property Law Review, Issues Paper 2) (February 2014); Queensland University of Technology Law, Commercial and Property Law Research Centre, *Procedural Issues under the Body Corporate and Community Management Act 1997* (Queensland Government Property Law Review Issues Paper) (December 2015); Western Australia, Landgate, *Strata Ti-*

Consultation Paper on Complex Stratas

tralia, has proposed in a recently published discussion paper adopting legislation that would bear some resemblance to British Columbia's sections as a means to further new legislative goals.²⁵³ The discussion paper proposed for consultation two potential reforms: a community-title scheme for complex, multi-building developments, allowing for the creation of several distinct strata corporations under a single umbrella strata corporation;²⁵⁴ and a similar structure, with an umbrella strata corporation and subsidiaries, for smaller-scaled, mixed-use developments in a single building.²⁵⁵ The second proposal has some resemblance to British Columbia sections. As this consultation paper was being prepared, the Western Australian group had just received "Cabinet's approval to draft the proposed amendments to the *Strata Titles Act 1985*."²⁵⁶

titles Act Discussion Paper (Discussion Draft 30 June 2014). Reforms proposed in the New South Wales report have been implemented in the *Strata Schemes Management Act 2015* (NSW) [not in force] and the *Strata Schemes Development Act 2015* (NSW) [not in force].

253. See *Strata Titles Act Discussion Paper*, *supra* note 252 at 3 ("The objective of this reform is to expand the number of subdivision and development options available to land developers, to provide development flexibilities currently available in other States, to facilitate appropriate sequencing of developments and to provide a framework for improved governance of large developments.").

254. See *ibid* at 5 ("A community title scheme is a mix of several strata and/or survey strata schemes within an integrated development. Each strata and survey strata scheme within the overall scheme can be developed and sold sequentially under an appropriate process for staging the construction of the project. Each strata and survey strata scheme may have its own dedicated common property and its own Management Statement containing by-laws appropriate to the development. In addition, there may be community infrastructure that can be operated or accessed by all residents in the community title scheme. In recognition that a community title scheme, where appropriate, may be on a larger scale than strata and survey-strata schemes, a community corporation, similar in nature to a strata company, will manage the community property and the implementation of the community by-laws applicable to all residents.").

255. See *ibid* at 40 ("A second proposal is that a layered or community title scheme may be undertaken within a building. This requires the Strata Titles Act to be amended to facilitate multiple strata schemes in a single building, with potential for each scheme to have a different use. The changes seek to address the problems highlighted by stakeholders: where uses are mixed in a single strata scheme, there is a risk that one use area can secure enough votes to outvote another use area and significantly interfere with that use. Different uses operating in different strata schemes is the preferred outcome, in that such a corporate structure clarifies the respective relationships and obligations of the participants and reduces potential for disputes." [footnote omitted]).

256. Online: <www0.landgate.wa.gov.au/titles-and-surveys/strata-reform>.

ISSUES FOR REFORM—GENERAL

Introduction

The issues for reform largely track the six areas highlighted in the background discussion on sections. The emphasis is on the powers and duties, governance, and finance of sections because these areas have attracted the most concern in commentary on sections.

This approach reflects the committee's view that, although sections should be retained as a part of British Columbia's strata-property law, the rules governing sections are in need of a significant fine-tuning. But the committee is aware that the basic question of whether or not sections should continue to exist is very much of interest to commentators. So these issues for reform begin with an examination of that basic issue.

Should the Strata Property Act continue to contain provisions enabling the creation and operation of sections?

Brief description of the issue

Sections provide a means for complex strata corporations to address difficult issues relating to cost sharing, control of property, and governance. But they also impose significant costs and administrative burdens on strata corporations. Do the benefits of sections outweigh their costs?

Discussion of options for reform

There are essentially only two options for this issue. Either sections are maintained or they are abolished.

In order to decide whether sections should be retained, it's necessary first to get a handle on what purposes they are meant to serve. Earlier this chapter noted that sections are intended to advance one of the three fundamental policy goals of the act, which is to provide flexibility in governance for an increasingly diverse range of strata corporations and to provide tools to ensure that different interests in complex stratas are given fair representation.²⁵⁷ This general goal plays out in a number of specific areas, most notably in connection with cost sharing and control over strata facilities.

257. See above at 29–30.

The most common rationale for employing sections within a strata corporation concerns cost sharing.²⁵⁸ Creating sections can provide a strata corporation with tools to share expenses in ways that differ from the act's general rule, which requires all strata-lot owners to contribute to the strata corporation's operating fund and contingency reserve fund,²⁵⁹ and to any special levies,²⁶⁰ in accordance with their strata lots' unit entitlements. Sections allow strata corporations to manage the tensions that can arise in a complex strata that doesn't fit into the act's default model of cost sharing, which emphasizes the principle that owners "are all in it together."²⁶¹ The classic example is a mixed-use strata property, where some expenses (say for items such as an enterphone or an elevator or for services such as landscaping) only benefit the owners of the residential strata lots, while other expenses (say for services such as additional trash pickup or enhanced security patrols) only benefit the owners of the nonresidential strata lots. Allocating such expenses strictly by unit entitlement can lead to overcharges for some owners and undercharges for others, a situation that can be viewed as unfair. While there are other means of displacing the act's general rules on cost sharing, the primary means requires a resolution passed by a unanimous vote, which is a very high threshold to meet. The voting threshold to implement sections (a resolution passed by a 3/4 vote) is much lower, making sections a more realistic option for changing the default cost-sharing formula.

The other main rationale for creating sections goes hand-in-hand with concerns about cost sharing. Since sections are corporations, section members also get a measure of control over facilities that come under the section's sphere of authority.²⁶² This means that sections, unlike other devices for managing cost sharing under

258. See Mangan, *supra* note 9 at 83 ("Perhaps the most common reason for creating a section is so the strata corporation can more easily allocate certain expenses to it."); Veronica P. Franco & Paul G. Mendes, "Strata Budgeting with Separate Sections and Strata Lot Types," in Continuing Legal Education Society of British Columbia, ed., *Strata Property—2013 Update: Materials Prepared for the Continuing Legal Education Seminar, Strata Property 2013 Update, Held in Vancouver, B.C., on April 18, 2013* (Vancouver: Continuing Legal Education Society of British Columbia, 2013) 3.1 at 3.4 ("Bylaws to create separate sections and strata lot types are usually introduced in strata corporations to create a more equitable allocation of expenses between strata lots.").

259. See *Strata Property Act*, *supra* note 1, s. 99.

260. See *ibid*, s 108.

261. Alvarez, *supra* note 84 at para 35.

262. See Margaret Fairweather & Lynn Ramsay, *Condominium Law & Practice in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia, 1996) at § 11.72 ("Forming a separate section is generally more important to non-residential than residential owners. Non-residential owners may want to exercise greater control over hours of operation, use of parking, frequency of cleaning and maintenance, and budget items. Owners of residential strata lots may want to spend more money than commercial [o]wners on a caretaker's suite, recreation facili-

the act, can also provide tools for managing other aspects of collective decision-making. So sections can amend²⁶³ and enforce bylaws²⁶⁴ on topics that solely concern that section. A section must have its own executive²⁶⁵ and can set its own priorities through its budget.²⁶⁶ Finally, sections can deal with third parties on a contractual basis²⁶⁷ and they can manage dispute resolution in the courts or through arbitration.²⁶⁸ These powers, among others, add up to a limited form of autonomy under the umbrella of a section's corporate status. This limited autonomy may be as attractive to some section members as the tools to modify cost sharing provided by sections. It might even, in some cases, be essential to the ongoing operations of a strata. As one commentator has put it, "[w]ithout sections, strata corporations that are composed of mixed ownership might well bog down and become dysfunctional."²⁶⁹ Some stratas that are denied access to sections under the act might even end up trying to recreate their elements outside the act's purview, by using contractual or other devices.²⁷⁰

Interestingly, one of the main lines of criticism of sections also focusses on their corporate status. Critics of sections often point out that the price paid for the autonomy afforded by sections is administrative complexity, duplication in procedures, poten-

ties, window cleaning, or landscape maintenance."); Baker & Walker, *supra* note 91 at 1.1.3 ("a key consideration that often drives decisions on how to structure mixed-use developments is the desire to restrict access to and use of certain common property areas to subgroups of owners").

263. See *Strata Property Act*, *supra* note 1, s 197 (2)–(3).

264. See *ibid*, s 194 (2) (f).

265. See *ibid*, s 196 (2).

266. See *ibid*, s 194 (2) (b).

267. See *ibid*, s 194 (2) (d).

268. See *ibid*, s 194 (2) (c).

269. Fanaken, *supra* note 9 at 143.

270. See above at 27–28 (discussing use of air-space parcels in certain real-estate developments). This kind of complex planning, taking place outside the boundaries of strata-property legislation, appears to be more common in some Australian states that lack section equivalents. See *Lot Entitlements under the Body Corporate and Community Management Act*, *supra* note 252 at 26 ("It is becoming common for developers to by-pass the [*Body Corporate and Community Management Act*] when allocating common expenses among different lots in a mixed used scheme. For example, developers often use volumetric subdivisions and a building management statement (BMS) to share costs. In this way, the retail, residential and commercial sections of a building may each be a separate scheme or lot and common costs and responsibility for shared facilities between the schemes will be regulated through the mechanism set out in the BMS. This type of arrangement may solve some problems in relation to allocation of costs but it may also create a range of other problems that cannot be easily solved within the current legal framework." [footnotes omitted]).

tial conflicts of interests for service providers, and added costs.²⁷¹ A strata corporation with sections will have two levels of government. And, in many cases, there will be more than one section, creating additional branches to that government. On paper, it might seem that the sphere of authority covered by each of these bodies of government is correspondingly smaller, but in practice it tends not to work out that way. Each section, and the strata corporation, will have to hold an annual general meeting, prepare and adopt a budget, and elect a strata council or section executive. Because the sections (and the strata corporation) are considered separate entities under the act, and because the rationale for creating sections expressly raises the prospect that these distinct entities will have different interests, strata managers and professionals dealing with the strata corporation and its sections will have to take care to avoid conflicts of interest. If a conflict can't be avoided, then a section or the strata corporation will have to seek alternative representation or service providers, which further increases delays and costs.

At this point it may be tempting to conclude that these added complications and costs are simply trade-offs that strata-lot owners knew, or could reasonably be expected to know, would be one of the consequences of creating sections. But this conclusion might miss the mark. In fact, sections are in most cases created by the strata's owner-developer.²⁷² An owner-developer often has its own motivations for creating sections, or it creates them with a speculative eye cast toward the strata property's future needs. If the owner-developer's projections turn out to be inaccurate, or if circumstances change, subsequent strata-lot owners may find themselves managing the complex realities of sections. And it isn't a simple matter to dissolve sections: it requires the approval of the section and the strata corporation.

271. See Baker & Walker, *supra* note 91 at 1.1.16 (noting "the significant administrative obligations and increased expenses that come with the decision to create a section, which is a separate legal entity from the strata corporation"); Franco & Mendes, *supra* note 258 at 3.1.4 ("Sections have a more complex governance structure and accordingly, are more difficult to manage and administer. Although what motivates the creation of separate sections is often a desire to allocate expenses more 'fairly' among strata lots, the creation of separate sections imposes a more complex governance structure on the strata corporation. This increased complexity can lead to increased costs and the potential for conflicts, not just between the owners, but also between the professionals who serve them, such as lawyers, property managers and accountants."). See also Real Estate Council of British Columbia, "Special Report from Council: Providing Strata Management Services to Strata Corporations that Contain Sections," *Report from Council Newsletters* 48:5 (March 2013), online: <www.recbc.ca/2013/03/march-2013-special-report-from-council> at 3 ("The creation of sections imposes a significant administrative burden on the section that is created.") [Real Estate Council, "Special Report"].

272. See Fanaken, *supra* note 9 at 144 ("More often than not, sections are created by the developer when the strata corporation is first conceived and built.").

This point leads into a broader complaint about sections. The frustrations that arise from the administrative complexity of sections apparently cause many stratas to flout the rules governing sections.²⁷³ While non-compliance shouldn't be excused, if it takes place on a large enough scale it may be a sign of deeper problems. While the concept of corporations within corporations might make sense on paper, in practice this difficult idea can leave people without legal training at a loss. As one commentator has noted, one of the most troublesome provisions from the point of view of compliance also features relatively clear rules.²⁷⁴ Taking this point a step further, this may be a sign that improving and clarifying the legislation might not be enough to tackle all the problems associated with sections. These problems may exist at a conceptual level, and may point to a fundamental mismatch between the problems that sections are most often adopted to solve (cost sharing, control over facilities) and the tool selected to solve those problems (creating semi-autonomous corporations).

The committee's tentative recommendation for reform

The committee struggled mightily with this issue. It has considerable sympathy with the criticisms of sections. But simply abolishing sections would leave a hole in British Columbia's strata-property law when it comes to addressing cost sharing (particularly allocation of capital expenses) and control of property. Despite considering numerous options, the committee was unable to hit upon an effective device that would fill that hole. So a sizable majority of the committee decided that the only realistic way forward is to continue with sections and to propose reforms to improve the law governing them. A minority of the committee remains unconvinced that the benefits of sections can ever make up for the burdens they impose on strata corporations.

The committee tentatively recommends:

1. *The Strata Property Act and the Strata Property Regulation should continue to contain provisions enabling the creation and operation of sections.*

273. See Baker & Walker, *supra* note 91 at 1.1.11 ("The most common error is to treat the strata corporation and the sections together as if they were a single corporation, with the sections as departments or profit centres to which costs can be allocated on whatever basis seems fair or rational."); Fanaken, *supra* note 9 at 146 ("In reality, very few strata corporations with separate sections actually operate properly."). See also Real Estate Council, "Special Report," *supra* note 271 at 1 ("it has come to the Council's attention that many strata managers and brokerages do not fully understand the legislative requirements related to the operation of sections").

274. See Baker & Walker, *supra* note 91 at 1.1.11 ("Despite the clarity of these provisions [*Strata Property Act*, *supra* note 1, s 194 (2)], finances of strata corporations with sections are not often managed in accordance with the *Strata Property Act*").

ISSUES FOR REFORM—QUALIFYING CONDITIONS

Should the Strata Property Act continue to require stratas to meet qualifying conditions to create sections?

Brief description of the issue

British Columbia’s strata-property legislation has never given stratas a completely free hand to form sections. The legislation has always required a strata corporation or its owner-developer to meet some condition regarding the organization of its sections. First, this condition was proximity, but that condition was fairly quickly abandoned for one based on use of the strata lots. This condition has remained in place in the *Strata Property Act*, albeit in a liberalized form. This approach stands in contrast to the approaches taken in other jurisdictions, which don’t impose qualifying conditions on the creation of sections. Should British Columbia follow their lead?

Discussion of options for reform

The main rationale for removing the qualifying conditions for creating sections is that it would provide additional support for the policy goal of having legislation on sections in the first place, which is to give strata corporations a flexible set of governance tools to deal with complex developments and arrangements. If strata corporations and owner-developers are able to make their own decisions on whether to have sections, without having to adhere to a set of legislative criteria, then this flexibility is enhanced. Conversely, a requirement that strata corporations fit into predetermined categories in order to create sections means that some strata corporations that want to have sections will not be able to create them.²⁷⁵ The qualifying conditions place limits on the utility of sections, sacrificing some of the flexibility that is supposed to be their overriding goal. In view of the approach taken to this issue in other jurisdictions, it is open to question whether that sacrifice is needed to ensure the practical functioning of the provisions on sections.

The experience of other jurisdictions could also be relevant for British Columbia. Saskatchewan, Tasmania, the Australian Capital Territory, and Victoria all freely allow the creation of sections. Saskatchewan’s legislation, for example, simply authorizes condominium corporations to “pass bylaws . . . for the establishment of sectors

275. See Baker & Walker, *supra* note 91 at § 1.1.8. This point has come up, in a limited way, in a few court cases involving strata-lot owners who were seeking an order creating sections. See *The Owners, Strata Plan VR2654 v Mason*, 2004 BCSC 685, 32 BCLR (4th) 282 at para 55, Joyce J; *Oakley v Strata Plan VIS1098*, 2003 BCSC 1700, 14 RPR (4th) 242 at para 17, Stromberg-Stein J.

within a corporation.”²⁷⁶ No external standard is used to determine whether or not establishing sectors (Saskatchewan’s version of sections) is appropriate for a given condominium corporation. The decision is entirely in the hands of the condominium corporation.

A rationale for maintaining conditions for the creation of sections has not been explicitly stated. Implicitly, these conditions may be a means of confining the use of sections to their place within a broader system for managing cost sharing specifically and strata-corporation governance generally. The default rule under the *Strata Property Act* is that expenses are shared in accordance with unit entitlement. Creating sections gives strata corporations tools to modify this rule, but there are other ways to displace the default rule. The act and the regulation also allow for the use of bylaws allocating expenses by types of strata lots²⁷⁷ and for the use of a formula other than unit entitlement (so long as it is approved by a resolution passed by a unanimous vote).²⁷⁸ An argument could be made that liberalizing the use of sections may upset this broader scheme. A further argument that could be marshalled in favour of retaining conditions for creating sections is that they have become fully entrenched in British Columbia strata-property law (unlike the case in other jurisdictions) and no one here appears to be publicly calling for their removal. Finally, when the *Strata Property Act* was enacted it liberalized the conditions for creating sections, a reform which was well received,²⁷⁹ and which may have removed the practical need for further liberalization.

Finally, it should be noted that there is no reason to treat this issue as a yes-or-no proposition. It is possible to retain conditions for creating sections, but to propose changes to the current conditions.

The committee’s tentative recommendation for reform

The committee was wary of liberalizing British Columbia’s approach to sections. It was concerned that going the route taken in other jurisdictions would lead to mischief here. Removing qualifying conditions from the legislation could result in highly

276. *Supra* note 198, s 47 (1) (m.1).

277. See *Strata Property Regulation*, *supra* note 2, s 6.4 (2)–(3).

278. See *Strata Property Act*, *supra* note 1, ss 100, 108 (2).

279. See Fairweather & Ramsay, *supra* note 262 at § 11.75 (noting before the advent of the *Strata Property Act*: “A significant oversight in the provisions is their application only to the mixed residential and non-residential project. They assume that all residential strata lots are of the same ‘type’ as are all non-residential strata lots. That, of course, is not the case.”); Vogt, *supra* note 149 at 3.1.06.

balkanized strata corporations. This result would undermine the act's general rules on cost sharing.

The committee gave extensive consideration to broadening the current approach by adding new qualifying conditions or by modifying the existing conditions. Noting that when this issue has arisen in litigation it has involved strata corporations that have developed in phases or that consist of more than one building, the committee discussed at length the possibility of allowing separate buildings to form sections. Ultimately, it decided against proposing this reform. There were concerns that it could be difficult to define the scope of the condition in legislation. For example, buildings that may appear separate to the naked eye could in fact share an underground parkade. Further, allowing sections to be formed in these circumstances could be courting problems with regard to access to property and governance. Finally, liberalizing the approach to sections would inevitably lead more and more strata corporations and owner-developers away from the general rule on cost sharing, exposing them to the practical and administrative problems that have cropped up in this area.

The committee tentatively recommends:

2. The Strata Property Act should continue to allow sections only for the purpose of representing the different interests of (a) owners of residential strata lots and owners of nonresidential strata lots, (b) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or (c) owners of different types of residential strata lots.

ISSUES FOR REFORM—CREATION

Should the Strata Property Act continue to allow an owner-developer to create sections?

Brief description of the issue

A major complaint about sections is that they impose administrative costs and burdens on strata corporations that have them. Yet the decision to create sections is typically made by the owner-developer, not the strata corporation. This can result in situations in which carrying on with sections benefits only a small subset of the strata corporation, but cancelling the sections is effectively impossible because it would require the consent of those who benefit from them. Limiting the decision to create sections to the strata corporation could be one way to ensure that this decision is only made by those who have given full consideration of the costs and benefits of the legal framework they are opting into.

Discussion of options for reform

The cases for and against allowing an owner-developer to create sections are built largely on the general reasons for and against allowing sections under the legislation.

Stratas generally create sections for two reasons. First, creating sections allows a strata corporation to allocate costs in a manner that differs from the general rule, which holds that strata-lot owners are “all in it together” and must share common expenses in strict accordance with their strata lots’ unit entitlements. This feature is particularly attractive in a mixed-use development, where different uses of strata lots may result in significantly different needs for goods and services. Second, since sections are considered to be legal entities in their own right, separate from the strata corporation, creating sections can allow certain strata-lot owners to achieve a high degree of autonomy. The legislation also allows for the designation of limited common property “for the exclusive use of all the strata lots in a section,”²⁸⁰ which can augment this degree of autonomy.²⁸¹

Allowing an owner-developer to create sections at the time a strata plan is filed in the land title office facilitates access to these benefits. It is administratively easier for an owner-developer to create sections, as it doesn’t require passage of resolutions by two (or more) 3/4 votes. Allowing owner-developers to create sections supports the policy of encouraging mixed-use developments, which is a goal for many municipalities in British Columbia.

The primary drawbacks of sections tie into their separate-entity status. This status means that a strata corporation with sections will effectively have two levels of government. With this comes administrative complexities, duplications in procedures, added costs, and the potential for conflicts of interest. These disadvantages have led to another concern with sections: the perceived widespread flouting of rules and procedures that support the separate-entity status of sections.²⁸²

280. *Supra* note 1, ss 192 (b), 193 (2) (b).

281. Heightened control over common property may be highly prized, for example, by a commercial-strata-lot owner who requires open access to the property during business hours and parking stalls for customers.

282. See Real Estate Council, “Special Report,” *supra* note 271 at 1. See generally Real Estate Council of British Columbia, *The Effect of the Real Estate Services Act on Management of Strata Corporations with Sections: An Information Guide for Strata Councils and Section Executives*, online: <www.recbc.ca/consumer/informationguideforstratacouncilsandsectionexecutives.html> [Real Estate Council, “Information Guide”].

Some of this flouting may be the result of a deliberate effort to take the benefits of having sections without any of the burdens. But it appears that it's more often the product of a failure to comprehend all the implications of creating sections. This may particularly be the case if sections were created by the owner-developer but the costs of administering sections fall on strata-lot owners who did not have a hand in that decision. Even if a majority of those strata-lot owners decide that sections are hurting more than helping them, it might not be a simple matter to reverse the owner-developer's choice. Cancelling sections requires resolutions passed "by a 3/4 vote" and "by a sectional 3/4 vote."²⁸³ These may be high hurdles to clear in any given case, particularly if a small subset of owners benefit from having a section, and they hold at least 25 percent of the eligible votes in the section.

The committee's tentative recommendation for reform

The committee has sympathy with complaints about the administrative burdens caused by sections. As a general point, owner-developers should think carefully about the implications of a decision to create sections on future strata-lot owners. Although many owner-developers already do give this decision careful forethought, there does still appear to be scope in many cases for further consideration about the impact of creating sections.

Despite these concerns, the committee came to the view that restricting owner-developers from creating sections would be too blunt a tool to use to tackle the problems created by sections. It would reduce the flexibility currently provided under the act and could have adverse effects across a range of issues. For example, in the development of a typical mixed-use strata property, a lot of thought goes into the physical layout of the strata property. There are often intricate considerations given to designations of limited common property. Taking the ability to create sections out of the owner-developer's hands would upset this type of planning and introduce an unacceptable level of uncertainty into the process.

The committee tentatively recommends:

3. The Strata Property Act should continue to permit an owner-developer to create sections.

283. *Strata Property Act*, *supra* note 1, s 193 (3). A "sectional 3/4 vote" is defined to mean "a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting" (*ibid*, s 193 (3.1)).

Should the Strata Property Act provide that, if an owner-developer creates sections, then a special mechanism should allow the sections to be cancelled early in their existence?

Brief description of the issue

This issue arises out of the previous one. If it isn't desirable to restrict an owner-developer from creating sections, then could there be some other means to strike a better balance between the interests of the owner-developer and strata-lot owners?

Discussion of options for reform

Potentially, an unlimited number of options could be considered as addressing this issue. The committee focussed its considerations on a narrower range involving voting at an early annual general meeting of the strata corporation.

This type of compromise approach could be seen as the best of both worlds. It would continue the current policy of the act, which has some advantages, but would also ensure that there is some level of informed consent among the owners who will ultimately have to live with the decision to create sections.

But this approach could just as easily be seen as failing to address the roots of the problem, since the administrative problems that sections cause likely won't crop up until years after approving the decision to create them. It also could undermine, to a degree, the policy of supporting mixed-use developments, by making it that much more complicated and uncertain for an owner-developer to create the administrative structure that it wants under the act.

The committee's tentative recommendation for reform

The committee decided that an early-cancellation option for sections created by an owner-developer would be an effective mechanism to alleviate some of the operational and administrative concerns that may come with the decision to create sections. The committee's considerations also addressed the following features of its proposal.

- **Timing of the vote.** The committee discussed whether the vote should be held by at least the first or the second annual general meeting of the strata corporation. In the end, the committee opted for the second, after noting that the first annual general meeting already has a large number of mandatory items that must appear on its agenda. A decision about sections could get lost in the shuffle at this meeting. Holding off on the decision for a

somewhat longer period would give strata-lot owners a better sense of how sections operate in practice. Finally, the committee noted that a conceptually similar idea for another issue—strata-management contracts—is also geared to the second annual general meeting.²⁸⁴

- **Majority required.** There are numerous ways to structure the voting majorities required for early cancellation. After a lengthy discussion, the committee decided that the approach it favoured would call for cancellation of all sections only by resolutions passed by majority votes of each of the sections. In the committee's view, this approach strikes the best balance between being achievable in practice and ensuring that minority interests aren't vulnerable to being easily overridden by the majority.
- **Transitional rule.** The committee gave some thought to whether its proposal should apply to existing strata corporations. It decided that it should only apply to strata corporations created after the provision comes into force, and not to existing strata corporations.

The committee tentatively recommends:

4. If an owner-developer creates sections at the time a strata plan is filed in the land title office, then the Strata Property Act should provide that, on or before the date of the strata corporation's second annual general meeting, the sections comprising the strata corporation may, by resolutions passed by a majority vote of each of the sections, cancel the sections.

Should the Strata Property Act require that, when a section is created by a strata corporation, the bylaws must set out the date of the section's first annual general meeting?

Brief description of the issue

When sections are created by a strata corporation, there is sometimes confusion about the date on which the section is to hold its first annual general meeting. This confusion relates to an overriding complaint about the operation of sections, which is that some strata corporations fail to appreciate that sections are separate entities that must have their own general meetings.

284. See *Strata Property Act*, *ibid*, s 24.

Discussion of options for reform

There is widespread concern that sections are not being operated as the separate corporate entities that the *Strata Property Act* characterizes them to be. This concern makes itself manifest in many practices. One that is often cited is the failure to hold an annual general meeting for a section.²⁸⁵

The committee understands that one (but not the only) contributing factor to this concern is confusion over when a section should hold its first annual general meeting. A modest reform requiring that the date of the first annual general meeting be set out in the bylaws when a strata corporation creates a section may help to address this problem.

The advantage of such a reform is that it would bring clarity to the question of when a section must hold its first annual general meeting. It would focus attention on this meeting being a separate requirement, not one that could be met by subsuming the section's annual general meeting within the strata corporation's annual general meeting. The downsides are that this reform would add another mandatory requirement to meet in creating sections and that it would be relatively difficult to enforce compliance.

The committee's tentative recommendation for reform

In the committee's view, this proposal will bring some needed clarity. It should also be of some assistance in addressing one of the areas of operational difficulty for sections.

The committee tentatively recommends:

5. The Strata Property Act should provide that, if a section is created after a strata corporation's first annual general meeting, then the bylaws must set out the date of the first annual general meeting of the section.

285. See Real Estate Council, "Information Guide," *supra* note 282 at para 12 ("Although it is often common practice for strata corporations with sections to have one AGM for the strata corporation, and for the budget approved by the strata corporation to contain expenses for the sections, such a practice does not conform to the SPA.").

Should the Strata Property Act require that the creation or cancellation of sections by a strata corporation be approved by a resolution passed by a 3/4 vote in all cases?

Brief description of the issue

A strata corporation may create or cancel a section by “a resolution to amend the by-laws to provide for either the creation and administration of each section or the cancellation of the sections.”²⁸⁶ Under section 193 of the act, this resolution must be passed

- by a 3/4 vote, and
- by a sectional 3/4 vote.²⁸⁷

But section 128 of the act allows for the creation of a different voting threshold for a bloc of nonresidential strata lots.²⁸⁸ Is it acceptable for a section to be created or cancelled in some cases by a resolution passed by a voting threshold other than a 3/4 vote?

Discussion of options for reform

The case for a legislative amendment largely rests on a need for clarity. Section 193 calls for resolutions passed by a 3/4 vote to create or cancel sections. But this portion of the provision is prefaced by language that characterizes the resolution as being a resolution that amends the bylaws. This language engages section 128, which appears to open up the prospect of a strata corporation or a section composed of nonresidential strata lots approving the resolution by some other voting threshold. If section 193 simply stated that it prevailed over section 128, then any confusion would be dispelled. There would be a single, clear voting threshold in all cases.

286. *Strata Property Act*, *supra* note 1, s 193 (2) (a).

287. *Ibid*, s 193 (3). A “sectional 3/4 vote” is defined to mean “a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting” (*ibid*, s 193 (3.1)).

288. See *Strata Property Act*, *supra* note 1, s 128 (1) (“Subject to section 197, amendments to bylaws must be approved at an annual or special general meeting, . . . (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.”).

The other option to consider is to continue with the status quo. This option would have the benefit of supporting the implicit policy of section 128, which is to give certain strata corporations enhanced flexibility in approving bylaw amendments.

The committee's tentative recommendation for reform

The committee favours clarifying the relationship between sections 128 and 193. It also favours ensuring that a single voting threshold applies to the creation and cancellation of sections.

The committee tentatively recommends:

6. Section 193 of the Strata Property Act should be amended to clarify that creation or cancellation of a section requires a resolution passed by a 3/4 vote in all cases, despite the provisions of section 128 (1) (b) and (c), which allow amendments to a bylaw to be approved by a resolution passed by a voting threshold other than a 3/4 vote in the case of a strata plan composed entirely of nonresidential strata lots or in the case of a strata plan composed of both residential and nonresidential strata lots.

Should new forms be prescribed for the creation, amendment, and cancellation of a section?

Brief description of the issue

There can sometimes be challenges and difficulties to finding information about a section in the land title office. Are there any practical reforms that could remedy these challenges and difficulties?

Discussion of options for reform

When a section is created, the registrar of land titles “may establish a general index for the section.”²⁸⁹ The decision to establish a general index is in the registrar’s hands. The committee understands that, in many cases, a general index isn’t established for a section. The result of this decision is that, for anyone searching the land title office for information about the section, it is necessary to search fillings in relation to the strata corporation. Sometimes, this is an onerous and time-consuming task.

289. *Strata Property Act*, *ibid*, s 193 (5).

There are any number of ways to remedy or mitigate these concerns. One approach, which the committee quickly ruled out, would be to require the registrar to establish a general index for each section created. In the committee's view, it wouldn't be appropriate or practical to fetter the registrar's discretion in this way.

The committee instead settled on the compromise approach of proposing that special forms be prescribed for bylaw amendments that result in the creation or cancellation of a section, or the amendment of bylaws relating to a section. Special forms would put people on guard about the existence of sections in a strata corporation. And they would help to focus searches in the land title office. The downsides to this approach are minimal. There would be some added cost to the creation of the form. Filings in the land title office would be slightly more complex.

The committee's tentative recommendation for reform

In the committee's view, prescribing special forms is an acceptable way to address these practical concerns.

The committee tentatively recommends:

7. Special forms should be prescribed under the Strata Property Act for the creation, amendment, and cancellation of a section.

Should the Strata Property Act provide for the categorization of filings concerning the creation, amendment, and cancellation of sections in the strata corporation's general index?

Brief description of the issue

This issue goes hand-in-hand with the previous one. It examines legislative changes needed to implement the committee's tentative recommendation to prescribe special forms for bylaws creating or cancelling a section and for amendments to bylaws relating to a section. In this case, the focus is on the need for section 193 (5), which (as noted in the discussion of the previous issue) provides "[o]n the creation of a section the registrar may establish a general index for the section."²⁹⁰

290. *Ibid*, s 193 (5).

Discussion of options for reform

The *Strata Property Act* contains a list of the documents that a registrar is required to “make an endorsement of . . . in the general index.”²⁹¹ This system doesn’t provide for the classification of documents relating to a section, as opposed to the strata corporation.

The committee’s previous tentative recommendation will go some way to clarifying the situation. But corresponding legislative changes are needed to ensure that the strata corporation’s general index distinguishes documents relating to a section from those relating to the broader strata corporation. The proposed legislative amendment would help to bring about that result by categorizing filings relating to a section.

Going hand-in-hand with this proposal is a proposal to repeal the authority granted to the registrar to “establish a general index for the section.” The committee understands that this authority is rarely used. Retaining it in the face of authority to categorize filings would be counterproductive.

In the committee’s view, these proposals would clarify both strata-property law and strata-property practice without imposing undue burdens on the land title office. They are superior to the status quo, which the committee views as flawed.

The committee’s tentative recommendation for reform

The committee tentatively recommends:

8. Section 193 (5) of the Strata Property Act should be repealed and section 250 (2) of the Strata Property Act should be amended to provide for the categorization of filings addressing the creation, amendment, and cancellation of sections.

291. *Ibid*, s 250 (2) (“The registrar must make an endorsement of all of the following in the general index: (a) the Schedule of Unit Entitlement referred to in section 245 (a); (b) the Schedule of Voting Rights, if any, referred to in section 245 (b); (c) the mailing address, and any fax number, of the strata corporation filed under section 62 or 245 (c); (d) the bylaws referred to in section 245 (d); (e) any amendments to the bylaws; (f) any amalgamation agreements under section 269; (g) any order of the registrar under section 275 or of the Supreme Court under section 279; (h) any resolutions and accompanying documents that are required to be filed in the land title office under this Act; (i) any other document relating to the strata corporation that is required to be filed in the land title office and that is not noted or endorsed elsewhere in the records of the land title office.”).

ISSUES FOR REFORM—POWERS AND DUTIES

Should the Strata Property Act give sections authority over common property?

Brief description of the issue

The *Strata Property Act* enables strata corporations to adopt “resolutions to designate *limited* common property . . . for the exclusive use of all the strata lots in a section.”²⁹² In contrast, a strata corporation has authority over common property, common assets, and strata lots.²⁹³ The limitations on sections’ authority has led to some operational confusion, particularly in connection with the duty to repair and maintain common property. Should sections’ authority be expanded?

Discussion of options for reform

One option would be to amend the *Strata Property Act* and give sections authority that corresponds to that of a strata corporation. Legislation in force elsewhere takes this more-liberal approach in granting section equivalents authority over common property. For example, Saskatchewan allows a bylaw respecting sectors to

- provide for the management, control, administration, use and enjoyment of the units, common property and common facilities in the sector;
- provide for the maintenance of the common property, common facilities and services units in the sector.²⁹⁴

Tasmania’s legislation provides an example of another approach. Under the Tasmania act, a body corporate (the equivalent of a strata corporation) “may be divided into 2 or more separate bodies corporate”²⁹⁵ and, when this division occurs, the constituent documents for the bodies corporate “must define the functions and responsibilities of each body corporate and, in doing so, may create an administrative hierarchy with one or more bodies corporate at each level of the hierarchy.”²⁹⁶

292. *Ibid*, ss 192 (b), 193 (2) (b) [emphasis added].

293. See *ibid*, ss 3 (responsibilities of strata corporation), 119 (2) (nature of bylaws).

294. *Supra* note 198, s 47.1 (a)–(b).

295. *Strata Titles Act 1998* (Tas), s 72 (1).

296. *Strata Titles Act 1998* (Tas), s. 72 (7) (a).

The potential problem with British Columbia's comparatively narrow approach comes to light when it's recalled that many of the operational conflicts involving sections arise from, as one judge put it, "the division of powers between the strata corporation and the section."²⁹⁷ This division of powers has proved to be particularly contentious in relation to responsibility for repairs and maintenance of common property. In many cases, sections are created "to recognize that there may be architectural differences amongst the strata lots,"²⁹⁸ calling for, for example, different sections for townhouses and apartment buildings. If the roofs, hallways, elevators, and other common areas of these buildings aren't designated as limited common property for the use of the section then they don't fall within the relevant provision of the act.²⁹⁹

A recent case³⁰⁰ has considered the authority of a section to carry out repairs to common property. The court concluded that the "Act does not refer to the obligation of a section to repair and maintain common property as distinct from limited common property," so "it appears that common property of the strata corporation remains the responsibility of the strata corporation to maintain."³⁰¹ The court went on to speculate that "[s]ections may take on responsibility for common property repair and maintenance of common property appurtenant to or adjoining the strata units in section if the bylaws permit it,"³⁰² but since the bylaws at issue in the case did not take this step, it wasn't necessary to form any conclusions on this issue.³⁰³ The issue does remain very much a live one, as many strata corporations have apparently created bylaws that "make a section responsible for the repair and maintenance of common property 'appurtenant to' or 'adjoining' the strata lots in a section."³⁰⁴ But

297. *Yang, supra* note 212 at para 4.

298. *Fanaken, supra* note 9 at 143.

299. See *British Columbia Strata Property Practice Manual, supra* note 9 at § 3.20 ("This is important to note in mixed-use developments consisting of both residential and non-residential strata lots where separate sections have been created, and each section has its own roof, or where sections occupy more than one building, each with its own roof. Unless the roofs are designated on the strata plan as LCP for the exclusive use of all the strata lots in a section, the roofs are common property, and generally the strata corporation has the responsibility to repair and maintain them." [cross-references omitted]). See also *Strata Property Act, supra* note 1, s 72 (obligation of strata corporation to repair and maintain common property and common assets).

300. *Yang, supra* note 212.

301. *Ibid* at para 26.

302. *Ibid* at para 28.

303. *Ibid*.

304. See *British Columbia Strata Property Practice Manual, supra* note 9 at § 6A.31.

the act doesn't provide explicit support for this practice. So the question arises whether it should, like the acts in other jurisdictions, expressly recognize that sections may have authority over common property.

There are several reasons for amending the act to allow for sections to be given authority over common property. Such an amendment would support the legislative goal of sections, which is to provide flexible governance models for complex stratas. There are many reasons for a strata corporation to want to adopt sections. In some cases, designating limited common property in favour of a section may be enough to meet the needs of the strata corporation. But in other cases this might not go far enough. Strata corporations appear to be filling in the gaps by adopting bylaws that, in one way or another, assign responsibility for repair and maintenance of common property to sections.³⁰⁵ Amending the act to make it clear that sections can have authority over common property would put these arrangements on firmer ground. It may also reduce operational conflicts and disputes between sections and strata corporations, by allowing a strata to work out a clearer division of powers between the strata corporation and its sections.

But there are also reasons to oppose allowing sections to have authority over common property. Such an amendment would further entrench sections in the legislation. It would also enhance their power within a strata development, while it chips away at the broader authority of the strata corporation. At least one commentator has wondered whether the existing list of corporate powers expressly assigned to sections³⁰⁶ goes too far and ends up being “inconsistent with the basic premise” of sections as representatives of different interests within the strata corporation.³⁰⁷ This proposed reform would be another large step in what could be seen as the balkanization of strata corporations that have sections. It also may be telling that, although many critics have identified this issue as a problem, no one has come out and directly said that the *Strata Property Act* should be amended to give sections authority over common property.

The committee's tentative recommendation for reform

The committee had many concerns about extending the authority of sections to common property. There was a sense that such a reform could lead to confusion. For

305. See Baker & Walker, *supra* note 91 at 1.1.9 (“it is not uncommon for bylaws to obligate a section to repair and maintain not only limited common property designated for the use of strata lots in that [section], but also building components sheltering the section’s strata lots”).

306. See *Strata Property Act*, *supra* note 1, s 194.

307. Fanaken, *supra* note 9 at 145.

example, if a strata property suffered building-envelope failures and it was subject to four or five sections, then it could be difficult to determine which section is responsible for which portion of the needed repairs. Such confusion could end up breeding litigation.

The proposal could also have a detrimental aspect on the communal nature of strata-property living and cost sharing. It could serve to further entrench the tendency to use sections promiscuously, as a means to sever certain uses from the broader strata corporation. Finally, the committee took notice of the fact that there didn't appear to be any vocal public support for reforming the law in this way.

The committee tentatively recommends:

9. The Strata Property Act should provide that bylaws respecting sections cannot provide for the control, management, maintenance, use, and enjoyment of common property.

Should the Strata Property Act give sections authority over common assets and strata lots?

Brief description of the issue

This issue for reform is the sequel to the previous issue. Should a section's sphere of authority be enhanced to encompass common assets and strata lots?

Discussion of options for reform

As noted above, the *Strata Property Act* enables strata corporations to adopt "resolutions to designate *limited* common property . . . for the exclusive use of all the strata lots in a section,"³⁰⁸ while, in contrast, a strata corporation is legislatively "responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners"³⁰⁹ and for enforcing bylaws that "may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation."³¹⁰

While there has been considerable comment on a section's authority over common property, there has been comparatively little consideration of the other two areas over which a strata corporation may have authority: common assets and strata lots.

308. *Supra* note 1, ss 192 (b), 193 (2) (b) [emphasis added].

309. *Ibid*, s 3.

310. *Ibid*, s 119 (2).

This makes sense, as legal issues are more likely to arise in relation to common property than either of common assets or strata lots.

The advantages and disadvantages of extending a section's sphere of authority to common assets and strata lots mirror those of extending a section's authority to common property, but on a comparatively smaller scale. It would support the broader legislative purpose of sections to provide greater flexibility in organizing strata properties. It may also help clarify issues over the division of powers between strata corporations and sections. On the other hand, it could be a step in the direction of balkanizing strata corporations and could sow confusion and discord.

The committee's tentative recommendation for reform

In the committee's view, this proposed reform would represent a useful, pragmatic, and cautious step in the direction of clarifying the powers and duties of sections.

The committee tentatively recommends:

10. The Strata Property Act should provide that bylaws respecting sections can provide for the control, management, maintenance, use, and enjoyment of common assets of the section or a strata lot of the section.

Should sections retain the power to enforce bylaws and rules?

Brief description of the issue

The *Strata Property Act* provides that a section "has the same powers and duties as the strata corporation . . . to enforce bylaws and rules."³¹¹ Although the section's powers are limited "to a matter that relates solely to the section,"³¹² there still is the potential for overlap and confusion in the application of this provision. Could a legislative amendment address these concerns?

Discussion of options for reform

The committee considered a series of options in relation to this issue. It started by examining whether the provision should simply be repealed, effectively leaving enforcement entirely in the hands of the strata corporation. This approach would have the benefit of simplicity and clarity. But it would also undercut one of the purposes often cited for creating sections. Sections are often used to address issues around control of facilities and property. If they ultimately had to turn to the strata corpora-

311. *Ibid*, s 194 (1) (f).

312. *Ibid*, s 194 (1).

tion for enforcement, it would limit some of the flexibility in organizing strata properties currently found in the act.

The committee also considered whether it would be possible to clearly delineate, in separate documents if possible, which bylaws are section bylaws and which are strata-corporation bylaws. In this way, operational overlap and conflicts should be limited, as it would be clearer for the appropriate body to enforce a specific bylaw. The concern is that this approach would introduce further complexity and potential for confusion into the system. Bylaws creating sections will invariably be strata-corporation bylaws. It might be difficult in some cases to separate section from strata-corporation bylaws. Making these judgments could end up casting further administrative burdens onto stratas.

The final option considered by the committee was the status quo. The current provision does support the legislative purposes of sections. But it also can give rise to administrative overlap and confusion.

The committee's tentative recommendation for reform

Despite the problems inherent in the current provision, the committee views it as the best approach when it's compared to the other options.

The committee tentatively recommends:

11. Section 194 (2) (f) of the Strata Property Act should be retained as it is currently worded.

Should sections be given enhanced power to obtain insurance?

Brief description of the issue

Sections have the power to obtain insurance coverage, but that power is limited "only" to cases that meet one of the following two conditions:

- if the insurance is "against perils that are not insured by the strata corporation," or
- if the insurance is "for amounts that are in excess of amounts insured by the strata corporation."³¹³

313. *Ibid*, s 194 (4).

Even though these two conditions describe the two most common circumstances in which a section may want to obtain insurance, their existence may also be tying the hands of sections in other circumstances. Should the legislation provide greater scope to a section's power to obtain insurance?

Discussion of options for reform

The committee considered two options: retaining the status quo and liberalizing the legislation to allow sections to obtain insurance coverage in their discretion.

The current provision can be seen as being narrowly tailored to just those situations when a section needs insurance. Insurance coverage is framed as being first and foremost a matter for the strata corporation. A section can only step in if or to the extent that a strata corporation has not obtained insurance. In this way, it may help to guard against possible duplications in coverage or overcoverage.

The drawback of this approach is that it limits the freedom of a section executive to make decisions about insurance. If a section is to be considered as a separate corporation, then it could be argued that it should be able to make its own decisions about risk and insurance coverage.

The committee's tentative recommendation for reform

In the committee's view, the act's approach to sections and insurance should be liberalized. Although concerns about excess coverage may arise, these concerns can best be addressed, as they are in other cases, by sound practical judgment.

The committee tentatively recommends:

12. Section 194 (4) of the Strata Property Act should be amended by striking out "only" and by adding as a new paragraph (c) the words "for any other purpose in the discretion of the section."

Should the Strata Property Act expressly permit a mortgagee to give a Mortgagee's Request for Notification to a section?

Brief description of the issue

If a mortgagee of a strata lot "wishes to receive notices of annual or special general meetings under section 45 and notices of money owing under section 113" of the *Strata Property Act*, then that mortgagee must give a form of notice to the strata cor-

poration.³¹⁴ This form is prescribed under the act, and it's called a Mortgagee's Request for Notification. No similar provision exists in relation to sections, even though similar issues may arise in their case. Should the legislation make express provision for giving a Mortgagee's Request for Notification to a section?

Discussion of options for reform

The rationale for creating a provision that directly addresses this issue is twofold. First, it would respect the policy of treating sections as a corporate entity distinct from a strata corporation. Second, it would clear up any uncertainty over whether a mortgagee could provide an effective Mortgagee's Request for Notification to a section. Both subjects covered by a Mortgagee's Request for Notification—strata corporation general meetings and debts owing by a strata-lot owner to the strata corporation—have equivalents for sections. It's not difficult to appreciate that a mortgagee may wish to receive notice from a section in these cases.

There may be some downsides to amending the act to address this issue. It would make the act longer and, arguably, more complex. It could be argued that the act implicitly provides for this issue, so it isn't necessary to spell out the authority explicitly.

The committee's tentative recommendation for reform

For the committee, this issue was one of several in which the legislation governing sections could be made clearer and more explicit.

The committee tentatively recommends:

13. The Strata Property Act should provide that a mortgagee may give a Mortgagee's Request for Notification to a section, as well as to the strata corporation.

Should the Strata Property Act require sections to file their mailing addresses in the land title office?

Brief description of the issue

The act provides that a "strata corporation must ensure that the correct mailing address for the strata corporation is filed in the land title office."³¹⁵ The purpose of this requirement is to facilitate the giving of notices to and the serving of documents on a

314. *Ibid*, s 60.

315. *Ibid*, s 62 (1).

strata corporation. No parallel provision exists for sections, even though a section may “sue or arbitrate in the name of the section.”³¹⁶ A commentator has identified this as a gap in the legislative framework.³¹⁷ Should legislation be proposed to fill this gap?

Discussion of options for reform

The committee considered two options: changing the legislation to expressly provide for a section filing its mailing address in the land title office and retaining the status quo.

An amendment would help to clarify the legislation. It would also support the existing section power to sue and arbitrate in its own name.

But it could add to the administrative burden on a strata corporation with sections. It would also add to the broader burden of administering the act, as a new form would likely need to be developed to support such a legislative change. And it would serve, in a small way, to further entrench sections as separate entities.

The committee’s tentative recommendation for reform

The committee decided that the benefits of clarifying the legislation on this point outweigh any potential burdens that an amendment might create.

The committee tentatively recommends:

14. The Strata Property Act should require a section to file its correct mailing address, and any changes to that address, in the land title office.

ISSUES FOR REFORM—GOVERNANCE

Should the Strata Property Act contain an express declaration that the act applies to sections?

Brief description of the issue

The *Strata Property Act* spells out that “the provisions of this Act apply to a strata corporation with sections.”³¹⁸ What the act fails to say directly is that it applies to

316. *Ibid*, s 194 (2) (c).

317. See Baker & Walker, *supra* note 91 at 1.1.18.

318. *Supra* note 1, s 190 (1).

sections. This absence potentially creates gaps in the legal framework applicable to sections. Should it be addressed by amending the act?

Discussion of options for reform

The issue essentially presents a straightforward yes-or-no question on whether the act should be amended to expressly declare that it applies to sections.

The advantage of such an amendment is that it could provide a clear answer to potentially difficult questions about the scope of the act. In some cases, the act could be seen as ambiguous on this score. One example of ambiguity that the committee considered at length is whether the act's provision on court applications to prevent or remedy unfair acts applies to a section.³¹⁹ Although the relevant provision doesn't mention sections, it's not hard to conceive of situations involving a section that could give rise to such a court application.

On the other hand, it could be argued that such an amendment isn't necessary. The answers to many questions about sections may be implicit in the act, which should clear up most ambiguities in practice.

The committee's tentative recommendation for reform

The committee understands that there continues to be administrative and operational challenges with sections. This proposed reform would help, in a modest way, to clarify the law and to address these problems.

The committee tentatively recommends:

15. The Strata Property Act should contain an express declaration that the act applies to sections.

319. *Ibid*, s 164 (“(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting. (2) For the purposes of subsection (1), the court may (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes, (b) vary a transaction or resolution, and (c) regulate the conduct of the strata corporation's future affairs.”).

Should the Strata Property Act require sections to provide an information certificate?

Brief description of the issue

A strata corporation is required to provide an information certificate in the prescribed form (Form B) within “one week of a request by an owner, a purchaser or a person authorized by an owner or purchaser.”³²⁰ The certificate is intended to disclose information, primarily relating to finances and governance, about the strata corporation to owners and purchasers.³²¹ The information contained in the certificate “is binding on the strata corporation in its dealings with a person who relied on the certificate and acted reasonably in doing so.”³²²

The legislation requiring strata corporations to provide information certificates doesn’t mention sections. Commentary on the act has labelled this a “governance issue” for sections that can lead to some uncertainty and confusion in practice.³²³ Should this governance issue be resolved by expressly requiring sections to provide a form of information certificate tailored to a section’s sphere of authority?

Discussion of options for reform

This issue generates two main options for reform: either amend the act to make it expressly require a section to provide an information certificate or retain the status quo. Another potential option would be to amend the act to state expressly that a section does not have to provide an information certificate.

Requiring a section to provide an information certificate would enhance disclosure to owners and purchasers, furthering the policy goals of the legislation. Sections may have control over relevant information for the certificate. And, if the reforms proposed elsewhere in this consultation paper are implemented, that store of information under section control would very likely increase. Requiring a section, rather than the strata corporation, to certify the information on the certificate would also be in harmony with the grant of separate corporate status for sections provided under the act. Although some information disclosed in or attached to the certificate

320. *Strata Property Act*, *ibid*, s 59 (1).

321. See *ibid*, s 59 (3). Along with the certificate, the strata corporation must provide copies of its rules (if any), its current budget, the owner-developer’s rental disclosure statement (if any), and its most recent depreciation report (if any) (see *ibid*, s 59 (4)).

322. *Ibid*, s 59 (5).

323. Baker & Walker, *supra* note 91 at 1.1.18.

might not be appropriate for sections,³²⁴ this concern can be dealt with by ensuring that the legislation is crafted to fit the areas over which a section may have authority.

But extending the requirement to give an information certificate to sections will result in an administrative burden on the section. Duplication would be the likely result, as precious few owners or purchasers would be satisfied with a certificate from only the strata corporation or a section. It also isn't clear whether this issue is more of a theoretical problem with interpreting the act than a tangible, practical concern. The strata corporation and the section may be able to work together to address any issues, without the need for a legislative requirement.

The last point gives implicit support to retaining the status quo. The current legislation may give both strata corporations and sections the flexibility to deal with information certificates in a practical manner. But it isn't clear that this is what is happening in practice. Instead, there are concerns that the law is ambiguous, isn't giving proper guidance to strata corporations and sections, and is contributing to some of the administrative confusion over sections.

Finally, another approach to clarifying the law would be to make it state that sections aren't responsible for information certificates. This approach would clearly place the full responsibility for information certificates on the strata corporation. It may streamline the process by avoiding duplication. But it could have the opposite effect. It may prove to be more difficult for a strata corporation to coordinate its response to a request for an information certificate with a section if the section knows that it is under no obligation to provide a certificate of its own. This could lead to delays or, in the worst case, owners and purchasers not receiving relevant information.

The committee's tentative recommendation for reform

The committee is in favour of amending the act to require a section to provide an information certificate. In its view, such an amendment would clarify the act. It would also support the legislative purpose of the certificate. Certain information, relating to fees or litigation, for example, may only be known to a section or may only be under the control of a section. Owners and purchasers may benefit from the disclosure of this information.

324. See e.g. *supra* note 1, ss 59 (3) (1) (requiring disclosure of "number of strata lots in the strata plan that are rented"), 59 (4) (d) (requiring "most recent depreciation report" to be attached to the certificate).

The committee is aware that its legislative proposal may require the development of a new form if it is to be fully implemented.

The committee tentatively recommends:

16. The Strata Property Act should require a section to provide an information certificate under section 59 for matters concerning the section on request by an owner, a purchaser, or a person authorized by an owner or a purchaser.

Should the information certificate be modified to address whether a strata corporation has sections?

Brief description of the issue

This issue flows from the previous one. In considering whether a section should be required to give an owner or a purchaser an information certificate, the committee noted that it can often be difficult for people to establish whether a section exists and whether a strata lot is encompassed within a section. Should the act contain a mechanism to compel disclosure of this information?

Discussion of options for reform

The options for this issue are straightforward: either amend the form to provide additional questions about the existence of a section and whether a strata lot is part of a section or retain the status quo.

Amending the form would be one way to give owners and (especially) purchasers information about the strata corporation that is not readily available elsewhere. It would put them on notice and give them a focus for additional searches. In this way, it would support the overall purpose of the information certificate and promote clarity and transparency.

The downside of an amendment is that it would add to the requirements for completing the information certificate. There are concerns about the cost of compiling information for the certificate and the timeliness in which certificates are provided. Adding to the information required by the certificate may add to these concerns.

The committee's tentative recommendation for reform

Clarity on the existence of a section and whether a strata-lot is part of a section is an important consumer-protection consideration. Modifying the information certificate is a relatively straightforward way to achieve this clarity. In the committee's view, the benefits from making this change outweigh any potential disadvantages.

The committee tentatively recommends:

17. *The Form B (information certificate) for strata corporations should be modified to ask (a) does the strata corporation have sections, (b) if so, is this strata lot part of a section, and (c) if yes, which section does this strata lot belong to.*

Should the Strata Property Act require sections to provide certificate-of-payment information to a strata corporation?

Brief description of the issue

The *Strata Property Act* requires a strata corporation to provide a certificate of payment in the prescribed form (Form F) within “one week of the request of an owner or purchaser, or a person authorized by an owner or purchaser.”³²⁵ The certificate calls for the strata corporation to certify that

- the owner does not owe money to the strata corporation, or
- the owner does owe money but
 - the money claimed by the strata corporation has been paid into court, or to the strata corporation in trust, under section 114, or
 - arrangements satisfactory to the strata corporation have been made to pay the money owing.³²⁶

The enabling provisions in the act don’t expressly mention sections. Should the act be amended to directly address whether sections can be required to give a certificate of payment?

Discussion of options for reform

The committee considered three main options for this issue: expressly recognizing the separate authority of a section to give a certificate of payment, retaining the status quo, and a compromise option.

The rationale for expressly extending this requirement to sections is that, in some cases, the owner may owe money to the section. This may escape the notice of the strata corporation and, as a commentator put it, leave “a section vulnerable to the

325. *Ibid*, s 115 (1).

326. *Ibid*, s. 115 (1) (a)-(b).

transfer of property without the prior settling of amounts owing to a section.”³²⁷ Making it clear that a section is required to provide a certificate of payment, then, would support and enhance the legislative purpose for these certificates, which is to give a measure of protection to strata corporations and, ultimately, strata-lot purchasers.

The downsides to this proposed reform are similar to the disadvantages noted in the previous issue. It would lead to some duplicated efforts and additional administrative burdens. An argument could be made that this is an area that should be the preserve of the strata corporation alone.

These concerns over potential overlaps and other administrative burdens could be addressed by retaining the law in its current form. In practice, it appears that a strata corporation with sections would rarely give a certificate of payment without first consulting with the section. But there is nothing currently in the act to ensure that this consultation occurs, or that it occurs in a timely way.

There is a middle way between these two approaches. The legislation could continue to require the strata corporation to be responsible for the certificate of payment. But if the strata corporation contains sections, then there could also be a legislative requirement on those sections to report information needed to complete the certificate to the strata corporation, as required by the strata corporation. This compromise approach could address concerns about payments owing to a section being missed without dividing up (and potentially duplicating) the responsibility to provide a certificate of payment.

The committee’s tentative recommendations for reform

The committee favours the compromise approach to this issue. This approach would adequately address concerns about money owing to a section and wouldn’t compound existing problems relating to duplication and the balkanization of strata-corporation governance. In the committee’s view, the legislative provision should set a short timeframe for compliance with a strata-corporation’s request for certificate-of-payment information.

The committee tentatively recommends:

18. The Strata Property Act should require a section to provide any information necessary to complete a certificate of payment under section 115 of the act within three days of a request from its strata corporation.

327. Baker & Walker, *supra* note 91 at 1.1.18.

The committee is also aware that full implementation of this tentative recommendation will require a new form.

The committee tentatively recommends:

19. A new form under the Strata Property Act should be created for the section to provide the requisite information to the strata corporation.

ISSUES FOR REFORM—FINANCES

Should the Strata Property Act allow sections to register a lien against a section owner's strata lot if the section owner fails to make certain prescribed payments?

Brief description of the issue

Sections are authorized to “require section owners to pay strata fees and special levies for expenditures the section authorizes.”³²⁸ The strata corporation has similar authority for the whole strata property.³²⁹ If an owner fails to make required payments³³⁰ to the strata corporation, then the strata corporation has a statutory option to enforce its payment obligation. It “may register a lien against an owner's strata lot.”³³¹

Several commentators have grappled with whether sections have a similar power to file a lien in the face of a strata-lot owner's failure to pay the strata fees and special levies for expenditures the section authorizes.³³² This commentary tends to favour a cautious interpretation of the legislation. Since the act does not expressly mention sections in the enabling provision, sections would be well advised to have the strata corporation file a lien in these circumstances.³³³ But the commentators also

328. *Strata Property Act*, *supra* note 1, s 194 (2) (b).

329. See *ibid*, ss 99 (1), 108 (1).

330. With respect to the owner's strata lot, these payments are strata fees, special levies, the cost of an owner's failure to comply with a work order, or the strata lot's share of a judgment against the strata corporation (see *ibid*, s 116 (1)).

331. *Ibid*, s 116 (1).

332. See Mangan, *supra* note 9 at 81–82; Vogt, *supra* note 149 at 3.1.07.

333. See Mangan, *supra* note 9 at 82 (“Where a remedy, such as the lien procedure, may deprive a person of his or her property, such as a strata lot, the courts typically require very explicit language in the statute authorizing the procedure.”); Vogt, *supra* note 149 at 3.1.07 (“The better

acknowledge that there is a counterargument, which would find implicit authority for a section to file a lien in its express authority to require payment of strata fees and special levies.³³⁴ Should the *Strata Property Act* be amended to address this uncertainty by explicitly enabling sections to file liens under section 116?

Discussion of options for reform

The committee considered three options for reform: amending the legislation to provide that a section may file a lien under section 116, amending the legislation to clarify that only a strata corporation may file a lien under section 116, and retaining the current position of the act.

Giving sections the express authority to register a lien would serve to clarify the act. Many of the criticisms of sections relate to gaps or silences in the legislation that are seen as giving rise to “the uncertain aspect of a section’s authority.”³³⁵ This issue is a classic example of this problem, which has already stimulated a debate among commentators. Since there appears to be some uncertainty about the reach of a section’s powers, express language in the act would dispel that uncertainty.

Allowing sections to register liens under section 116 would also streamline the administration of sections somewhat. If an owner’s non-payment relates to a section activity, then it makes some sense that the section executive and administration would be in charge of the lien process, rather than having to rely on the strata corporation to take proceedings on the section’s behalf. This approach would also underscore the act’s general characterization of a section as a distinct legal entity.

There are downsides to this approach. Amending the act would give sections further powers. It could also set the stage for other conflicts. For example, if an owner is in default to multiple sections or to a section and the strata corporation, whose lien should have priority?³³⁶ Finally, despite complaints about the uncertainties of the current law, no commentators have actually called for legislative reform.

view is that only the strata corporation can file a lien.”).

334. See Mangan, *supra* note 9 at 82 (“In general, when a statute empowers someone, such as a section, to do something, all the powers that are necessary to enable the person to do that thing are also deemed to be given.” [footnote omitted]); Vogt, *supra* note 149 at 3.1.07 (“It is still unclear whether separate sections can file their own liens against an owner’s title.”).

335. Mangan, *supra* note 9 at 81.

336. See Vogt, *supra* note 149 at 3.1.07 (“If separate sections can file their own liens, whose lien takes priority? The ‘first in time’ approach is not appropriate where, in most circumstances, the same property manager will be acting for both the section executives and the strata council.”).

Some of these downsides could be addressed by an amendment that restricts registering liens under section 116 just to strata corporations. Such an approach would streamline administration and avoid conflicts. It would also have the effect of clarifying the act.

But restricting the registration of liens could cause its own administrative problems. Sections would have to depend on the strata corporation to pursue their lien claims. Since different individuals and (by definition) different interests are involved in both groups, this arrangement may complicate the registration and enforcement of liens. It also represents an approach that seems to be at odds with the corporate status of sections.

It could be argued that the status quo gives just enough direction to sections and strata corporations to allow them to tailor their own administrative solutions to any problems that arise. But the problem with this argument is that a number of commentators have said that the vagueness of the current provision could just as easily lead to confusion and misjudgments in practice.

The committee's tentative recommendation for reform

The committee decided that the current law needs clarification. It favours amending the act to make it explicit that a section may register a lien under section 116. Such a power is necessary to support section powers to raise funds through strata fees and special levies. It also would respect the act's general classification of sections as corporations, separate from the strata corporation.

The committee tentatively recommends:

20. The Strata Property Act should enable sections to file a lien under section 116 of the act.

Should a strata corporation's lien rank in priority to a section's lien?

Brief description of the issue

The *Strata Property Act* already contains one priority rule for liens.³³⁷ This existing priority rule only addresses how a strata corporation's lien ranks in relation to other

337. See *supra* note 1, s 116 (5) ("The strata corporation's lien ranks in priority to every other lien or registered charge except (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation, (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or (c) if the other lien or charge is made under the

liens or charges, authorized under other legislation. It doesn't provide any guidance on how a strata corporation's lien ranks in relation to a section's lien.

The previous tentative recommendation brings this issue to a head. If the legislation is going to expressly allow both strata corporations and sections to register liens, then what happens when both a strata corporation and a section register a lien against the same strata lot?

Discussion of options for reform

There is potentially a wide range of options that could address this issue. The committee reviewed several of them.

One approach would be to provide that priority is determined by the time of registering a lien: first in time, first in right. This rule has the advantages of clarity, simplicity, and familiarity. But it may not be the best fit with the realities of strata-property administration.

Another approach would be to have strata-corporation and section liens rank *pari passu*,³³⁸ that is, without preference based on the time of filing. This approach also represents a relatively familiar and straightforward rule. It may also be a better reflection of some aspects of strata-property administration. But it is also at odds with the large role played and greater responsibilities faced by the strata corporation.

A third approach would be to provide that a strata corporation's lien will always rank in priority over a section's lien, regardless of the time of registration. This rule would address concerns about the greater responsibilities of a strata corporation, for issues such as repair and replacement of common property, for example. It would also state a relatively clear rule. But it could be criticized for leaving the interests of sections decidedly in the back seat.

Finally, the committee considered whether it would be possible to rely on the court's discretion in determining priorities. Such an approach would be the most sensitive to the differences in details that can vary from case to case. But it would also be the most difficult rule to administer. It could result in disputes taking longer than otherwise to be resolved.

Builders Lien Act.”).

338. Latin: “with equal step.” See Black’s Law Dictionary, 10th ed, sub verbo “*pari passu*” (“proportionally; at an equal pace; without preference <creditors of a bankrupt estate will receive distributions *pari passu*>”).

The committee's tentative recommendation for reform

The committee gave extended consideration to its options for reform of this issue. It ultimately decided that the best rule is a clear rule that strata-corporation liens have priority over section liens. In the committee's view, this approach best addresses the greater responsibilities of the strata corporation and also provides a clear and straightforward rule.

The committee tentatively recommends:

21. If a strata corporation and a section both file liens under section 116 of the Strata Property Act with respect to the same strata lot, then the strata corporation's lien should rank in priority ahead of the lien of the section.

Should a section's lien rank in priority to every other lien and registered charge?

Brief description of the issue

Section 116 (5) of the act sets out a priority rule for strata-corporation liens. The rule provides that the "strata corporation's lien ranks in priority to every other lien or registered charge except"

- to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
- if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
- if the other lien or charge is made under the *Builders Lien Act*.³³⁹

Should the same rule apply to a section's lien?

Discussion of options for reform

Although this issue could generate a long list of potential rules to consider, the committee narrowed its focus to two choices: either adopt the act's existing rule for strata-corporation liens for section liens or leave the act silent on this point.

Adopting the existing rule would have a number of advantages. First, it would ensure that the legislation is clear on this issue. Further, it would likely align with the expectations of the strata-property sector. Logically, there should be little difference

339. *Supra* note 1, s 116 (5).

between a strata-corporation lien and a section lien. The same policy that supports the priority rule for strata-corporation liens applies to section liens.

But it could be argued that it's not strictly necessary for the act to have a special priority rule for section liens. This approach would effectively leave the issue to the courts. In all likelihood, the rule of first in time, first in right would end up applying to section liens.

The committee's tentative recommendation for reform

The committee favours making the act clear on the priority of section liens vis-à-vis other liens and registered charges. In the committee's view, the existing priority rule for strata-corporation liens is the best and most realistic choice for section liens. Adopting any other rule, or leaving the act silent, is likely to sow confusion.

The committee tentatively recommends:

22. A section's lien should rank in priority to every other lien or registered charge except (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation, (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or (c) if the other lien or charge is made under the Builders Lien Act.

Should a section and a strata corporation be required to give notice to each other of money owing to the section or strata corporation before registering a lien against the owner's strata lot?

Brief description of the issue

Section 112 of the act requires a strata corporation to give notice to a strata-lot owner before a lien is registered against the strata lot under section 116.³⁴⁰ The preceding tentative recommendations have introduced a new player into this picture: a section. Should the act require strata corporations and sections to give notice to one another before registering a lien?

340. *Supra* note 1, s 112 (2) ("Before the strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period.").

Discussion of options for reform

Instituting such a notice requirement would assist in the coordination of strata-property administration. It would help to ensure that sections and strata corporations are aware of each other's actions on financial matters and may help to address potential disputes in a more efficient way.

The downside of this option is that it would add one more requirement to the collection of a debt owing either to the strata corporation or a section. It could, in this sense, be seen as an administrative burden. There may be other means available to obtain this information.

The committee's tentative recommendation for reform

The committee decided that the benefits of a notice requirement would supersede any potential drawbacks. Ensuring that strata corporations and sections are aware of each other's actions when it comes to liens should improve the overall administration of strata properties and should help to avoid misunderstandings that could fester into full-scale disputes.

The committee tentatively recommends:

23. Section 112 of the Strata Property Act should be amended to provide that before a strata corporation or a section registers a lien under section 116 of the act against a strata lot, then that strata corporation or section must give notice, as the case may be, to the section or strata corporation.

Should the Strata Property Act be consequentially amended to expressly acknowledge the power of a section to file a lien under section 116?

Brief description of the issue

Sections 112 to 118 of the act contain the rules on liens. These provisions only mention strata corporations; they don't contain any references to sections. Should they be amended to refer to sections?

Discussion of options for reform

The advantage of passing consequential amendments to the act's rules on liens is that it will make the act clear and avoid potential misunderstandings. The only real downside to this approach is that it results in a wordier, and somewhat longer, statute.

The committee's tentative recommendation for reform

In the committee's view, making consequential amendments to these provisions is necessary to fully implement its proposals on liens and sections.

The committee tentatively recommends:

24. Consequential amendments should be made to sections 112 to 118 of the Strata Property Act to include sections.

Should the Strata Property Act require strata corporations with sections to have separate budgets?

Brief description of the issue

According to the act, a section "has the same powers and duties as the strata corporation . . . to budget and require section owners to pay strata fees and special levies for expenditures the section authorizes."³⁴¹ Many commentators have criticized how sections have used this power.³⁴² These criticisms often tie into the broader criticisms of the sections concept. Budgeting problems are seen as a concrete example of the failure of many strata-lot owners to grasp the act's conception of sections as separate, mini strata corporations. "The most common error is to treat the strata corporation and the sections together as if they were a single corporation," notes a commentator. "Associated with this is the common, but completely unlawful, practice of adopting all of the budgets as a single unified document voted on by all owners at a general meeting of the strata corporation."³⁴³ The source of this error may be an innocent misunderstanding of a relatively complex idea.³⁴⁴ But it could also in some

341. *Supra* note 1, s 194 (2) (b). The regulation requires that the following list of specific topics be addressed in a budget: "(a) the opening balance in the operating fund and the contingency reserve fund; (b) the estimated income from all sources other than strata fees, itemized by source; (c) the estimated expenditures out of the operating fund, itemized by category of expenditure; (d) the total of all contributions to the operating fund; (e) the total of all contributions to the contingency reserve fund; (f) each strata lot's monthly contribution to the operating fund; (g) each strata lot's monthly contribution to the contingency reserve fund; (h) the estimated balance in the operating fund at the end of the fiscal year; (i) the estimated balance in the contingency reserve fund at the end of the fiscal year" (*supra* note 2, s 6.6 (1)).

342. See e.g. Franco & Mendes, *supra* note 258 at 3.1.17 ("Budgeting issues in sections can be problematic."); Fanaken, *supra* note 9 at 147-49.

343. Baker & Walker, *supra* note 91 at § 1.1.11.

344. See *ibid* ("The problems usually begin with the developer, which typically prepares an interim budget pursuant to s. 13 and the first annual budget pursuant to s. 20. If those budgets are pre-

cases be an instance of “ ‘cherry picking’ the benefits of the creation of sections, while ignoring their associated burdens.”³⁴⁵ Should the act require that a section and a strata corporation must separate their budgets?

Discussion of options for reform

The committee considered the basic yes-or-no option of adding an express requirement to the act in response to this issue. It also considered whether additional guidance could be built into the act.

A legislative provision requiring separate budgets would bring additional clarity to the law, in an area where confusion appears to reign in practice. At least one commentator has called for legislation as the only way to dispel this confusion.³⁴⁶ Many more commentators point to this confusion as one of the most contentious aspects of the decision to create a section.³⁴⁷

It could be argued that legislation is unnecessary, since the act’s general grant of budget-making power to sections implicitly requires a separate budget for each section, in addition to the strata-corporation budget.³⁴⁸ Adding a new provision expressly requiring separate budgets would only serve to make the act longer, without adding anything substantively new.

The more difficult question is whether the act should contain specific directions on how to put together section budgets. The options here are practically limitless. The goal would be to move beyond simply requiring a section budget and to provide direction on the budget’s makeup. This would give the act even more clarity and would help in the administration of a section.

The difficulty consists in formulating directions that would be concrete and specific enough to be helpful, but that also wouldn’t tie the hands of some sections or introduce items that prove to be irrelevant to other sections. It should also be borne in mind that the regulation contains some direction on budget items,³⁴⁹ so legislation would have to strike new ground to avoid duplication.

pared incorrectly, the errors are often replicated by strata councils and strata managers who assume the developer knew what it was doing.”).

345. *Ibid.*

346. See Fanaken, *supra* note 9 at 147 (“statutory prescription and regulation is definitely needed”).

347. See *supra* notes 342–41.

348. See *supra* note 1, s 194 (2) (b).

349. See *supra* note 2, s 6.6 (1).

The committee's tentative recommendation for reform

The committee favours amending the *Strata Property Act* to expressly provide that a section must have a budget, in addition to a strata-corporation budget. While a case could be made that the act already implicitly contains this requirement, this implicit approach has not gone far enough to clear up the evident confusion in practice.

The committee doesn't favour amending the act to provide further explicit direction on the makeup of section budgets. If it were adopted, such an approach would logically have to apply to strata-corporation budgets, as well as section budgets. Some guidance on these issues can be found in the regulation; it isn't appropriate to add a greater level of detail to the act itself.

The committee tentatively recommends:

25. The Strata Property Act should expressly require a section within a strata corporation to have a separate budget.

Should the Strata Property Act require separate accounting for section funds?

Brief description of the issue

While the Real Estate Council of British Columbia, which regulates strata managers, requires strata managers "to maintain separate trust accounts in respect of the strata corporation and the section for which [it] receives funds,"³⁵⁰ there is nothing in the *Strata Property Act* that requires the separation of funds that strata corporations and sections are required to maintain.³⁵¹ The act does require each strata corpora-

350. Real Estate Council, "Special Report," *supra* note 271 at 8. See also *Real Estate Services Act*, SBC 2004, c 42, ss 1 "strata corporation" ("means a strata corporation within the meaning of the *Strata Property Act* and includes a section within the meaning of that Act"), 25–33 (trust accounts and other financial matters); Real Estate Council of British Columbia, *Real Estate Council Rules*, r 7-9 (2) ("A brokerage must, for each strata corporation on behalf of which the brokerage holds or receives money, maintain the following brokerage trust accounts: (a) at least one separate trust account in the name of the strata corporation; (b) if the brokerage is to hold contingency reserve fund money, at least one separate trust account in the name of the strata corporation for the contingency reserve fund money; (c) if the brokerage is to hold special levy money, at least one separate trust account in the name of the strata corporation for the special levy money.").

351. See Real Estate Council, "Special Report," *supra* note 271 at 15 ("The unwillingness to have section money in a separate trust account suggests that the section is content to let the strata corporation hold the funds on the section's behalf. If the funds were held by the strata corporation,

tion to establish an operating fund and a contingency reserve fund.³⁵² It also gives each section the power “to establish its own operating fund and contingency reserve fund for common expenses of the section.”³⁵³ Should the act also contain a requirement that a section keep its funds separate from those of the strata corporation?

Discussion of options for reform

Providing for separate accounting of strata-corporation and section funds would bring added clarity to the administration of sections. It would set a definite rule that is consistent with the separate corporate status that the act confers on sections. This approach would also support the related regulatory structure for strata managers.

Amending the *Strata Property Act* to require separate accounting of strata-corporation and section funds may have downsides. It would place a further administrative burden on strata corporations with sections, and would cause them to incur additional costs. It may also drive another barrier between strata corporations and sections.

The committee’s tentative recommendation for reform

The committee decided that the act should directly address this issue and provide a clear rule for separate accounting of strata-corporation and section funds. The committee favours this rule because it would support the existing regulatory structure for strata managers and would help to clarify the administration of sections.

The committee tentatively recommends:

26. The Strata Property Act should provide that operating funds, contingency-reserve-fund funds, and special-levy funds must be accounted for separately and maintained in separate accounts in a financial institution for the strata corporation and for each section.

the strata corporation would be the only party that could direct the payout of the funds. There is no prohibition on such an arrangement in SPA.”).

352. See *supra* note 1, s 92.

353. *Ibid*, s 194 (2) (a).

Should the Strata Property Act clarify that bylaws for the creation and administration of sections provide only for the administration of expenses that relate solely to the section?

Brief description of the issue

Section 192 of the act provides that an “owner developer may create sections for a strata corporation at the time the strata plan is deposited by filing in the land title office bylaws that provide for the creation and administration of each section.”³⁵⁴ As discussed earlier in this consultation paper,³⁵⁵ an owner-developer usually decides to create sections to address the cost-sharing problem. Once sections are created, the act provides “expenses of the strata corporation that *relate solely* to the strata lots in a section are shared by the owners of strata lots in the section.”³⁵⁶ But the committee understands that some owner-developers have gone further than the legal framework provides, essentially glossing over the highlighted words in the previous sentence and purporting to use bylaws to allocate expenses that relate in part to a section and in part to another section or to the broader strata corporation. Should the act be amended to address this practice?

Discussion of options for reform

Amending the act to address this issue would support its overall approach to the cost-sharing problem. The act’s general rule is that owners are all in it together. Sections allow for some scope to depart from the general rule—but only for expenses that relate solely to the strata lots in the section. The general rule can be varied, but to do this requires a resolution passed by a unanimous vote.³⁵⁷ Purporting to vary these rules in a strata corporation’s bylaws either effectively undermines this system or misleads the owners in that strata corporation. An amendment to the act would help to reinforce and clarify its approaches to the cost-sharing problem.

The drawbacks of such a legislative amendment are harder to grasp. It could be argued that this issue calls for legal education as opposed to law reform. If owner-developers had a clearer sense of the working of the act, then this issue wouldn’t arise and legislation would be unnecessary. An amendment would then only have the effect of lengthening the act.

354. *Ibid*, s 192 (a).

355. See above at 22–28.

356. *Supra* note 1, s 195 [emphasis added].

357. See *ibid*, s 100.

The committee's tentative recommendation for reform

In the committee's view, this issue poses a problem that legislation can and should address.

The committee tentatively recommends:

27. Section 192 (a) of the Strata Property Act should be amended by inserting after "bylaws that provide for the creation and administration of each section" the words "provided that the administration of expenses relates solely to the section."

ISSUES FOR REFORM—CANCELLATION

Should the Strata Property Act require that a resolution to cancel a section be approved by a sectional 3/4 vote in every other section of the strata corporation?

Brief description of the issue

The rules on cancelling a section are spelled out in section 193 of the act. These rules require a strata corporation to "hold an annual or special general meeting to consider . . . cancellation [of a section]." ³⁵⁸ Notice of this meeting must include "a resolution to amend the bylaws to provide for . . . the cancellation of the sections." ³⁵⁹

There is a special rule that applies to the voting threshold for passing this resolution. It must be approved by both the strata corporation and the affected section. As the legislation puts it, the resolution "must be passed"

- by a 3/4 vote, and
- by a sectional 3/4 vote.³⁶⁰

358. *Ibid*, s 193 (1).

359. *Ibid*, s 193 (2) (a).

360. *Ibid*, s 193 (3). "Sectional 3/4 vote" is defined to mean "a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting" (*ibid*, s 193 (3.1)).

But if the strata corporation has more than one section in existence, there is nothing in the legislation that requires the approval of those other sections to the cancellation of the section at issue. Should the act be amended to contain this requirement?

Discussion of options for reform

The committee considered two options for this issue: amending the act to require approval of all sections (plus the strata corporation) to cancel a section and retaining the status quo.

Amending the act would allow it to directly address situations in which a strata corporation has a number of sections with imbalances in their voting power. Consider, for example, a strata property that consists of a large apartment building and a small row of townhouses. The strata corporation in this example has two sections: one for the owners in the apartment building, the other for the townhouse owners. The sections were created to address the cost-sharing problem. So “expenses of the strata corporation that relate solely to the strata lots in a section” are allocated to the appropriate section. For example, expenses relating to the elevators are allocated to the apartment section, while expenses related to landscaping around the townhouses are allocated to the townhouse section.

At some point after this arrangement is set up, the owners in the apartment section decide that they want to cancel their section. The effect of this decision will be that expenses that were once allocated to owners in the section (such as those for the elevators) will become common expenses of the strata corporation, to be shared by all strata-lot owners in accordance with a formula based on their strata lots’ unit entitlements.³⁶¹ Under the current rules, the owners in the townhouse section don’t have an independent say in this decision, even though it will affect the calculation of their strata fees. In other words, the original solution to the cost-sharing problem for this strata corporation could be undone by one group of owners, creating a new arrangement that makes the expenses previously allocated to the apartment section into strata-corporation expenses, while leaving those expenses allocated to the townhouse section as section expenses.³⁶²

Requiring the consent of each section of a strata corporation to the cancellation of any section would directly address this concern. It would provide another layer of

361. See *ibid*, s 99.

362. The owners in the townhouse section could seek to cancel their section, but their ability to go through with this decision would be at the mercy of the greater voting power of the apartment owners, as they would determine whether or not a resolution of the strata corporation would pass by a 3/4 vote.

protection to section owners. Section owners in comparatively small sections would not be faced with situations in which cancellation of another section could leave them financially worse off but in which they also lacked the voting power to prevent this change.

This proposed reform could also provide some encouragement for stratas to think about decisions on sections and cost sharing holistically. Even when these decisions seem only to affect one group of owners they may have consequences that can ripple across the whole strata corporation.

There are some disadvantages to this proposed amendment. It would likely increase the time and cost associated with cancelling a section. And other downsides flow naturally into what may be considered strengths of the other option to consider, retaining the status quo.

In examining the advantages of the current rules on cancellation, it's important to note that cancelling a section entails "a resolution to amend the bylaws."³⁶³ As a result, it engages section 128, which provides that "amendments to bylaws must be approved at an annual or special general meeting"³⁶⁴ and "in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots."³⁶⁵

So section 128 already provides some protection against abuse of imbalances in voting power. If the example discussed earlier had featured a residential section and a commercial section, then section 128 would have applied³⁶⁶ and would have given both sections a say in the decision to cancel. As a result, section 128 lowers the potential for abuse.

The committee's tentative recommendation for reform

The committee is concerned about possible abuses of voting power in cancelling a section. Section 128 provides some protection, but it doesn't cover the field.

363. *Strata Property Act*, *supra* note 1, s 193 (2) (a).

364. *Ibid*, s 128 (1).

365. *Ibid*, s 128 (1) (c).

366. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 6A.15.

The committee also considered whether the act's provision on preventing or remedying unfair acts could address concerns about abuse of voting power in cancelling a section.³⁶⁷ The first thing to note about this provision is that it can only be invoked on "application of an owner or tenant."³⁶⁸ In other words, a section itself can't bring a court application seeking a remedy under this provision. An owner (or tenant) has to bear the cost and burden of applying to court, something which is likely to prove to be a disincentive to using section 164 to remedy a complaint for the group of owners in the section. Section 164 could be amended to allow for a section to apply to court. The committee considered this possibility. It decided that a provision directly addressing this issue for reform would be superior than attempting to extend section 164 to cover it.

The committee tentatively recommends:

28. The Strata Property Act should require that a resolution to cancel a section must be approved by sectional 3/4 votes in each other existing section of the strata corporation.

Should the Strata Property Regulation require that a resolution to amend a strata corporation's bylaws to cancel a section address issues arising as a consequence of cancelling a section?

Brief description of the issue

The *Strata Property Act's* rules for cancelling a section parallels its rules for a strata corporation creating a section. The act's provisions on cancellation and creation manage to intertwine the two topics:

- To create or cancel sections, the strata corporation must hold an annual or special general meeting to consider the creation or cancellation.
- The notice of meeting must include
 - a resolution to amend the bylaws to provide for either the creation and administration of each section or the cancellation of the sections, and
 - any resolutions to designate limited common property, in accordance with section 74, for the exclusive use of all the strata lots in a section or to remove a designation in accordance with section 75.
- The resolution [to amend the bylaws] must be passed
 - by a 3/4 vote, and

367. See *supra* note 1, s 164.

368. *Ibid*, s 164 (1).

- by a sectional 3/4 vote.³⁶⁹

These provisions only provide a procedure for cancelling a section. They don't address the consequences of cancelling a mini corporation that can have wide-ranging powers and duties. In this way, they differ significantly from other corporate-dissolution legislation, which tends to require that steps be taken to deal with the consequences of dissolution.³⁷⁰

A leading practice guide has singled out the need to address the consequences of cancelling a section as a recommended practice, especially in cases in which "the sections being cancelled have assets or liabilities, or are parties to contracts."³⁷¹ Should the act or the regulation be amended to implement these practices as requirements?

Discussion of options for reform

The committee approached this issue in two stages. First, it considered whether reform should be pursued or the status quo be retained. Second, if the law were to be reformed, then what model should guide that reform?

The advantage of the current law is that it imposes a relatively light administrative burden for cancelling a section. The drawback with this approach is that it potentially creates traps for the unwary. Cancelling a section that has assets, liabilities, or contractual obligations creates confusion and a host of problems that will need to be addressed by the broader strata corporation. The initial administrative convenience of the act's approach to cancellation may end up in unexpected costs or administrative problems. Costs may also be imposed on third parties. Finally, the current approach to cancelling a section seems out of step with the act's characterization of sections as corporations in their own right.

The committee closely examined two models to reform the law. The first model was based on the act's own requirements for a resolution adopting a special levy;³⁷² the

369. *Ibid*, s 193 (1)–(3). "Sectional 3/4 vote" is defined to mean "a vote in favour of a resolution in relation to a proposed or existing section by at least 3/4 of the votes cast by eligible voters in the section who are present in person or by proxy at the time the vote is taken and who have not abstained from voting" (*ibid*, s 193 (3.1)).

370. See *Business Corporations Act*, SBC 2002, c 57, ss 314–16; *Societies Act*, SBC 2015, c 18, s 124 [in force 28 November 2016]; *Cooperative Association Act*, SBC 1999, c 28, s 194.11.

371. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 6A.15.

372. *Supra* note 1, s 108 (3) ("The resolution to approve a special levy must set out all of the following: (a) the purpose of the levy; (b) the total amount of the levy; (c) the method used to deter-

second drew its inspiration from how British Columbia's major corporate statutes deal with dissolution of a corporation.

The first model, based on the act's approach to special levies, directly ties the issues to be considered in the resolution that effectively cancels a section to the section's limited corporate powers and duties. This approach may focus the attention of strata-council and section-executive members on the steps they should take before cancelling a section.³⁷³ The provision would serve an educational function, as well as requiring strata corporations and sections to attend to the practical issues that are likely to arise when a section is cancelled.

The downside of this approach is that it runs the risk of being both overinclusive and underinclusive. The explicit approach taken to listing issues would, of necessity, end up mentioning issues—such as, for example, litigation and arbitration—that likely wouldn't be a concern for most sections. More worryingly, the provision might miss an issue that was a problem for a given section. For example, a section could have a contingent liability that might not fit within the categories spelled out in the provision. This would set up an interpretive problem in a conflict. Was the section supposed to address the contingent liability before cancellation, even though it was not included in the list?

The second approach draws on corporate legislation. Dealing with assets and liabilities appears to be the baseline set by British Columbia's three major corporate statutes: the *Business Corporations Act*, the *Societies Act*, and the *Cooperative Association Act*.

mine each strata lot's share of the levy; (d) the amount of each strata lot's share of the levy; (e) the date by which the levy is to be paid or, if the levy is payable in installments, the dates by which the installments are to be paid.”).

373. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 6A.15 (“For example, if a section owns land, including a strata lot within the strata plan, the section will need to dispose of the land in accordance with s. 79 of the Act before it is cancelled—failing which it is possible that the land might escheat to the Crown. If the section owns personal property, including cash on deposit in any funds maintained prior to disposition, the section will need to dispose of that property in accordance with s. 82 of the Act. In most cases, the assets of a cancelled section could be transferred to the strata corporation, although the strata corporation and the sections should obtain independent legal advice on the dispositions and transfers. However, it should be noted that nothing in the legislation or the regulatory framework of the land title office requires assets and liabilities to be dealt with before cancellation, as would be the case with a voluntary dissolution of most other corporate entities. If a section is party to any contracts, early termination and assignment provisions of those contracts should be reviewed at the earliest opportunity.”).

- *Business Corporations Act*: for voluntary dissolution, a company must have “no assets”³⁷⁴ and “no liabilities . . . or made adequate provision for the payment of each of its liabilities.”³⁷⁵ The act has a lengthy provision dealing with provision for unpaid debts and undelivered assets, which effectively defines what “adequate provision” means for the purposes of this procedure.³⁷⁶
- *Societies Act*: before dissolution of a society by request to the registrar of companies, “all of the society’s liabilities must be paid or adequate provision for payment of the liabilities must be made,”³⁷⁷ and “after payment or adequate provision for payment of all of the society’s liabilities is made, the remaining money or other property of the society may be distributed”³⁷⁸ in accordance with rules set out in the legislation.³⁷⁹
- *Cooperative Association Act*: to wind up an association under the act’s voluntary winding-up procedure, “the majority of the directors, before calling the general meeting at which the resolution for the winding up of the association is to be proposed, must make an affidavit declaring that (a) they have made a full inquiry into the affairs of the association, and (b) they are of the opinion that the association will be able to pay its debts in full within the period, not exceeding 12 months from the start of the winding up, specified in the affidavit.”³⁸⁰

The affidavit requirement mentioned in the last bullet point—in connection with the *Cooperative Association Act*—is also a feature of both the *Business Corporation Act* and *Societies Act* procedures.³⁸¹

374. *Business Corporations Act*, *supra* note 370, s 314 (1) (b).

375. *Ibid*, s 314 (1) (c) (i)–(ii).

376. See *ibid*, s. 315.

377. *Societies Act*, *supra* note 370, s 124 (1) (a) [in force 28 November 2016].

378. *Ibid*, s 124 (1) (b) [in force 28 November 2016].

379. See *ibid*, s 124 (2) [in force 28 November 2016].

380. *Cooperative Association Act*, *supra* note 370, s 194.11 (1).

381. See *Business Corporations Act*, *supra* note 370, s 316 (1) (a), (2) (“An affidavit referred to in subsection (1) (a) must state (a) that the company’s dissolution has been duly authorized in accordance with section 314 (1) (a) or (2), as the case may be, (b) that the company has no assets, and (c) that the company (i) has no liabilities, as a result of section 315 (6) or otherwise, or (ii) has made adequate provision for the payment of each of its liabilities.”); *Societies Act*, *supra* note 370, s 126 (3) (b) (“Concurrently with the filing of a dissolution by request application, a society must file with the registrar . . . (b) an affidavit sworn by 2 or more directors of the society, or, if

This approach is cleaner from a drafting point of view. The use of general categories that are familiar to corporate lawyers would eliminate the risk of underinclusiveness. It's highly unlikely that some obscure contingent liability would escape from legislation based on this approach.

But this approach would not be as helpful from an educational standpoint. Lawyers may be familiar with what corporate dissolution entails, but if a section were proceeding without legal advice, it's possible that its executive could fail to deal with significant issues.

The committee's tentative recommendation for reform

In the committee's view, the law needs to address the consequences of cancelling a section. Since a section can be considered a mini strata corporation, there needs to be rules that ensure this type of corporation is dissolved in an orderly way. Simply trusting sections and strata corporations to take the necessary steps to deal with section assets, liabilities, and obligations is not a realistic option.

The committee prefers adopting rules based on the first model it considered. This model is in keeping with the approach used for special levies and it has a better chance of ensuring that strata-council members and section executives will address the relevant issues before terminating a section. The subjects that a resolution to terminate must address can be drawn from the existing list of section powers and duties,³⁸² supplemented by the additional powers and duties that are provided for in this consultation paper's tentative recommendations. The concern that such a list might prove to be underinclusive can be addressed by adding a catchall provision to the end of the list.

Finally, the committee considered whether this list should be located in the act or the regulation. The committee favours placing it in the regulation, because the list will, of necessity, be detailed and, should it ever need to be amended, the process for amending regulations is less onerous than the process for amending legislation.

the society has only one director, sworn by that director, declaring that, to the best of the knowledge of the directors or the sole director, as the case may be, (i) the society has no liabilities or has made adequate provision for the payment of all of the society's liabilities in accordance with section 124 (1) (a) [*distribution of property before dissolution or on liquidation*], and (ii) the remaining money or other property of the society, if any, has been distributed in accordance with section 124 (1) (b) and (2)." [in force 28 November 2016]].

382. See *Strata Property Act*, *supra* note 1, s 194 (2).

The committee tentatively recommends:

29. The Strata Property Regulation should require that the resolution to amend the by-laws to provide for the cancellation of a section must set out all of the following:

(a) any funds in the operating fund and contingency reserve fund for common expenses of the section have been transferred or disposed of; (b) any court proceeding or arbitration involving the section has been settled or discontinued; (c) any contracts in the name of the section have been assigned or terminated; (d) any land or other property held in the name of or on behalf of the section has been disposed of in accordance with the act; (e) any lien filed under section 116 of the act has been transferred or discharged; (f) any other charges, interests, liabilities, or assets of the section have been transferred or disposed of.

CHAPTER 4. TYPES

BACKGROUND

Introduction

A strata corporation is allowed to vary the general rule on cost sharing by identifying types of strata lots in its bylaws. Once the bylaws provide for types, the strata corporation's annual budget can allocate specific operating expenses³⁸³ to the type.

The pages that follow provide background information on the legislative history of types and on the current position of the law on types. This discussion begins by considering why types are a part of British Columbia's legal framework for strata properties.

The purpose of types and how they differ from sections

Types function as an exception to the act's general rule on cost sharing, which holds that strata-lot owners are "all in it together."³⁸⁴ As one judge put it, the "legislative policy behind [the creation of types] is to protect owners of one type of strata lot from having to pay costs which would be exclusively for the benefit of another type of strata lot."³⁸⁵

Types share this purpose with the subject of the previous chapter, sections. Readers may wonder why strata-property law contains two devices that overlap on their purposes.

The answer is that the overlap between types and sections doesn't reach the point of redundancy or out-and-out duplication. Although both are primarily devices for cost sharing, sections have secondary purposes and enhanced powers and duties, while types have significant limitations.

383. That is, those common expenses that are paid for out of the operating fund that the act requires each strata corporation to have. See *Strata Property Act*, *ibid*, s 92 ("To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to (a) an operating fund for common expenses that (i) usually occur either once a year or more often than once a year, or (ii) are necessary to obtain a depreciation report under section 94").

384. *Alvarez*, *supra* note 84 at para 35. See above at 22–28 for a detailed discussion of the cost-sharing problem.

385. *The Owners, Strata Plan LMS 1934 v Westminster Savings Credit Union*, 2004 BCSC 1718 at para 40, 28 RPR (4th) 150 [*Westminster Savings*], Morrison J.

Consultation Paper on Complex Stratas

The Real Estate Council of British Columbia has analyzed the differences between types and sections, with a view to highlighting how they may respond to the different needs of different kinds of strata corporations.³⁸⁶ The council has summarized these differences in a helpful table.³⁸⁷

Feature	Types	Sections
Which strata lots	Different character or form of structure. Could be townhouse or apartment, or residential and non-residential, or strata lots with balconies and strata lots without balconies	Apartment, townhouse, detached, and non-residential used for various purposes
How created	Bylaw must identify the different types	Bylaws creating sections must be approved by each of the potential sections and the strata corporation
What costs can be allocated	Operating—that relate to and benefit only one type	Operating or CRF [contingency reserve fund]—that are solely related to the strata lots in the section
Administrative burden	Different types of strata lots can be identified in the budget	Each section is a mini strata corporation and must exercise the powers and duties as applicable

At a very basic level, a kind of trade-off is involved in deciding whether types or sections are appropriate for a strata corporation: sections provide a greater range and expanded powers at a cost of increased administrative requirements; types can only be used in a more limited set of circumstances, but within those circumstances they represent a more streamlined and less expensive option.

386. See Real Estate Council, “Special Report,” *supra* note 271 at 2–5.

387. *Ibid* at 4.

Legislative history

Introduction

Types have been part of British Columbia’s strata-property law for over 40 years. In that time they have evolved significantly. To track this evolution, the noteworthy subjects to observe are:

- legislative enabling provision or definition;
- creation;
- sharing operating expenses;
- sharing capital expenses;
- powers, duties, and governance;
- cancellation.

1966 Strata Titles Act

Neither the 1966 act³⁸⁸ nor the standard bylaws prescribed under that act mentioned types.

1974–2000: Strata Titles Act to Condominium Act

Types made their first appearance in the 1974 act.³⁸⁹ The legislation contained the following provisions on the six identified subjects.

- **Legislative enabling provision or definition.** Types weren’t referred to in the body of the 1974 act. Instead, they were enabled by the first schedule of strata-corporation bylaws, which were appended to the act.³⁹⁰ These first-schedule bylaws applied by default to a strata corporation upon the filing of the strata plan in the land title office.³⁹¹ A strata corporation was entitled to add to, amend, or repeal any default bylaws.³⁹² Neither the act nor the first-schedule bylaws defined *type*, effectively leaving this task to the courts.

388. *Supra* note 13.

389. *Supra* note 14.

390. See *ibid*, first schedule, bylaw 49.

391. See *ibid*, s 17 (1).

392. See *ibid*, s 17 (4). A timing rule applied if the “strata corporation [was] administering a strata plan that is principally residential”: in these cases, the default bylaws couldn’t be changed “until

- **Creation.** Because the first-schedule bylaws applied to a strata corporation by default, there was no further action necessary to enable types. So long as a strata corporation factually had “more than one type of strata lot,”³⁹³ its bylaws would direct it to share costs in the manner described in the next two bullet points.³⁹⁴
- **Sharing operating expenses.** Since their advent in the 1974 act, types have been used to vary the cost-sharing rules for operating expenses. The first-schedule bylaw on types contained a double-barreled rule for apportioning a strata corporation’s common expenses:
 - [c]ommon expenses attributable to one or more type of strata lot shall be allocated to that type of strata lot and shall be borne by the owners of that type of strata lot in the proportion that the unit entitlement of all such types of strata lot;
 - [c]ommon expenses not attributable to a particular type or types of strata lot shall be allocated to all strata lots and shall be borne by the owners in proportion to the unit entitlement of their strata lots.³⁹⁵
- **Sharing capital expenses.** Although the 1974 act didn’t define *common expenses*, the term was understood as “likely includ[ing] the contingency reserve.”³⁹⁶ So under the act both expenses paid for out of the operating fund (those that occur once a year or more often) and expenses paid for out of the contingency reserve fund (those that occur less often than once a year—for example, emergency expenses or capital upgrades) could be allocated to different types of strata lots.
- **Powers, duties, and governance.** Since types weren’t characterized as corporate entities separate from the strata corporation, the bylaw didn’t assign specific powers or duties to types or provide for a types governance structure.
- **Cancellation.** The bylaw didn’t address how a type would be cancelled. As a matter of first principle, the first-schedule bylaw could be repealed or

a permanent strata council takes office,” unless the changes were approved by the superintendent of insurance (*ibid*, s 17 (2)).

393. *Ibid*, first schedule, bylaw 49.

394. See Mangan, *supra* note 9 at 396 (“In the past, many strata corporations relied on section 128(2) of the *Condominium Act* to allocate different expenses in their budgets to different types of strata lots. In other words, in their annual budgets those strata corporations distinguished different types of strata lot and separately allocated expenses to each type of strata lot.”).

395. 1974 act, *supra* note 14, first schedule, bylaw 49.

396. Fairweather & Ramsay, *supra* note 262 at § 10.39.

amended, and this would have the effect of eliminating types or altering their implementation in a strata corporation.³⁹⁷ But if a strata corporation did this, it wouldn't have to comply with a special cancellation rule and it wouldn't receive any guidance from the act or the first-schedule bylaws on the implications of cancelling types.

These rules remained consistent over the 26 years in which the *Strata Titles Act* was in force. Over that time, the legislation was revised periodically and ultimately acquired the name *Condominium Act*.³⁹⁸ The only (slight) change in approach saw the provision on types moved from a schedule to the 1974 act to a position in the body of the *Condominium Act*.³⁹⁹

Strata Property Act

Initial impressions

The advent of the *Strata Property Act* brought significant changes to how the legal framework manages types. Right from the start, courts noticed that the “more formal scheme”⁴⁰⁰ for allocating expenses to different types under the *Strata Property Act* “makes such allocation[s] more difficult to put in place.”⁴⁰¹

The pages that follow track the six subjects discussed in relation to types under the second-generation legislation. Special emphasis is given to the subjects that saw the greatest changes: creation of types and sharing capital expenses.

397. See 1974 act, *supra* note 14, s 17 (4).

398. *Supra* note 16.

399. *Ibid*, s 128 (2) (“If a strata plan consists of more than one type of strata lot, the common expenses must be apportioned in the following manner: (a) common expenses attributable to one or more type of strata lot must be allocated to that type of strata lot and must be borne by the owners of that type of strata lot in proportion that the unit entitlement of that strata lot bears to the aggregate unit entitlement of all types of strata lots concerned; (b) common expenses not attributable to a particular type or types of strata lot must be allocated to all strata lots and must be borne by the owners in proportion to the unit entitlement of their strata lots.”).

400. *Alvarez*, *supra* note 84 at para 34.

401. *Christensen v The Owners, Strata Plan KAS468*, 2013 BCSC 1714 at para 21, [2013] BCJ No 2058 (QL), Butler J.

Legislative enabling provision or definition

The act itself doesn't mention types. Instead, provisions governing types are found in the *Strata Property Regulation*.⁴⁰²

Neither the act nor the regulation contains a definition of *type*.⁴⁰³ As was the case under the previous legislation, the task of defining *type* falls to the courts.

But court decisions have not provided much guidance on this matter. As one commentator has put it, the few court cases on types that exist “tend to be fact-driven.”⁴⁰⁴ That is, the cases deal narrowly with the circumstances at hand and don't provide much assistance for strata corporations that want to plan their approach to types on tested general principles.

Several writers have concluded that the state of the act, the regulation, and the case law has left strata corporations with something like a free hand when it comes to identifying types of strata lots in their bylaws.⁴⁰⁵ The only apparent limit is that a type can't be based on arbitrary criteria. “[T]he court decisions to date considering the issue of when ‘types’ of strata lots can be designated,” one commentator has noted, “suggest that there must be some principled basis on which the distinction is made.”⁴⁰⁶

This principled basis is usually found in the architectural characteristics of the strata lots. As a leading case concluded, “‘type’ should be taken to denote the character or form of structure.”⁴⁰⁷ Types are commonly used where strata lots in a single strata plan are in different buildings (for example, apartments and townhouses) or where it's possible to draw distinctions between strata lots in the same building (for example, a penthouse and other strata lots).⁴⁰⁸

402. *Supra* note 2, ss 6.4 (2), 11.2 (2).

403. Confusingly, the regulation does contain a definition of *type*, but it isn't applicable to the subject matter of this chapter (see *ibid*, s 11.1). Instead, the definition is used in relation to one of the qualifying conditions for creating sections. See above at 34–35.

404. Mangan, *supra* note 9 at 391.

405. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 7.43 (“there appears to be no limit to the creation of types”); Baker & Walker, *supra* note 91 at 1.1.6 (“it would appear that there is no restriction on the designation of ‘types’”).

406. Baker & Walker, *ibid* at 1.1.7.

407. *Smith v Read*, [1993] BCJ No 1348 at para 10 (QL), 40 ACWS (3d) 517 (SC) [*Smith*], Davies J.

408. See also Baker & Walker, *supra* note 91 at 1.1.6 (“possible ‘types’ distinctions could include: residential v. commercial; retail v. office; townhouse v. apartment; strata lots with fireplaces, and

Differences in the uses of strata lots forms another common basis for the creation of types.⁴⁰⁹

Creation

The *Strata Property Act* and its regulation brought in significant changes to how types are created. Under the previous legislation, provisions addressing cost sharing by types of strata lots were included in the standard bylaws that applied by default to strata corporations. Under the *Strata Property Act*, types are no longer the default setting.

A strata corporation implements types by adopting a bylaw that identifies specific types of strata lots in the strata plan.⁴¹⁰ The standard bylaws that are set out in a schedule to the *Strata Property Act* do not contain such a bylaw. This means that the deliberate action of the strata corporation is needed to craft and approve the required bylaw.⁴¹¹

Sharing operating expenses

Once a types bylaw is in place, “if a contribution to the operating fund relates to and benefits only one type of strata lot,” then that “contribution is shared only by owners of strata lots of that type.”⁴¹² In calculating the affected strata lots’ share of this contribution, the general formula for determining strata fees is replaced with the following formula:⁴¹³

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots of the type to which the contribution relates}} \times \text{contribution to operating fund}$$

those without; strata lots in a wood-frame building v. strata lots in a concrete building”).

409. See *ibid*.

410. See *Strata Property Regulation*, *supra* note 2, s 6.4 (2).

411. See *Strata Property Act*, *supra* note 1, ss 119 (2) (“On deposit of the strata plan an owner developer may file bylaws that differ from the Standard Bylaws.”), 126–28 (rules and procedures for amending bylaws after deposit of strata plan).

412. *Strata Property Regulation*, *supra* note 2, s 6.4 (2).

413. *Ibid*, s 6.4 (2). A parallel regulation exists for cases in which “a contribution to the operating fund relates to and benefits only one type of strata lot in a *section*” [emphasis added]. See *ibid*, s 11.2 (2).

This formula ensures that that a specific contribution is shared by the owners of strata lots that come within the definition of a given type found in the strata corporation's bylaws. In this way, it implements the policy of "protecting" other owners from expenses that only give a benefit to the owners of that type of strata lot.⁴¹⁴

The framing of this contribution formula effectively imposes a couple of limitations on the use of types: (1) they can only be used in relation to contributions to the strata corporation's operating fund and (2) that contribution must "relate to and benefit only" the type in question.

The first limitation restricts the use of types to operating expenses, that is expenses that occur regularly (once a year or more often). Examples of such operating expenses would be charges for utilities, for regular maintenance of building components, and for insurance.

The second limitation is established by the regulation's reference to a contribution to a strata corporation's operating fund that "relates to and benefits only one type of strata lot."⁴¹⁵ The meaning of this phrase was considered in a 2004 decision of the court of appeal.⁴¹⁶ In *Ernest & Twins*, a shopping-centre strata had bylaws that identified three types of strata lots: commercial, parking, and signage.⁴¹⁷ The strata corporation allocated what it called "common expenses" to the commercial and signage strata lots and what it called "additional expenses" to the parking strata lots.⁴¹⁸ A change in the composition of the strata council resulted in a new budget in which strata fees were "were set pro rata based on all of the owners bearing a portion of all the expenses."⁴¹⁹ The new budget resulted in a significant increase in strata fees for the parking strata lots.⁴²⁰

Two strata-lot owners sought to set aside the budget. They argued that "s. 6.4(2) [of the *Strata Property Regulation*] requires the [strata] Corporation to make a *bona fide* determination of the benefit, if any, of each item of operating expense to each type of

414. *Westminster Savings*, *supra* note 385 at para 40.

415. *Supra* note 2, s 6.4 (2). See also *ibid*, s 11.2 (2) (applying to types within a section).

416. *Ernest & Twins Ventures (PP) Ltd v Strata Plan LMS 3259*, 2004 BCCA 597, 34 BCLR (4th) 229 [*Ernest & Twins*], Lowry JA.

417. *Ibid* at para 3. Confusingly, the bylaws described these types of strata lots as "sections," which appears to have been a mistake. See *ibid* at para 15.

418. *Ibid* at para 4.

419. *Ibid* at para 7.

420. *Ibid*.

strata lot and to allocate each item in proportion to the benefit.”⁴²¹ In their view, the regulation required strata corporations to make a fine-grained determination of the extent to which a particular operating expense benefits a particular type of strata lot and to allocate the operating expense in proportion to that benefit.⁴²²

The court rejected this argument. In its interpretation, the regulation “affords a limited exception to the equal sharing of operating expenses.”⁴²³ Instead of a fine-grained determination of the relative proportion to which a contribution to the operating fund benefits a type of strata-lot, the court viewed the regulation as creating a kind of on-off switch, which only operates to allocate certain expenses to types if the expense “exclusively” relates to or benefits the type.⁴²⁴

Sharing capital expenses

Types can’t be used to vary the formula for sharing long-term capital expenditures or unexpected expenses, which would be met with payments out of the strata corporation’s contingency reserve fund. This marks a significant departure from the position under earlier legislation. To address the differences between the two acts, the *Strata Property Regulation* provided a set of transitional provisions.

The transitional provisions allowed cost sharing by type in a strata corporation’s budget that was in effect on the coming into force of the *Strata Property Act* in 2000.⁴²⁵ Such a strata was also given a grace period until 2002 to “enact a bylaw that identifies the type of strata lot set out in the budget.”⁴²⁶ Despite the act’s general

421. *Ibid* at para 15.

422. See *ibid* at para 16 (“where an item of expense benefits all types of strata lots equally, the expense is to be allocated equally among them, but where an item of expense benefits one type of strata lot disproportionately, the Corporation must allocate the expense in a manner that reflects the extent of the benefit derived by each type of strata lot from that item of expense”).

423. *Ibid* at para 18.

424. See *ibid* (“In my view, s. 6.4(2) of the Regulation provides only that where an item of operating expense relates to or benefits one type of strata lot *exclusively*, and that type is identified in the bylaws, the contribution for that item of expense is to be shared by the owners of that one type of strata lot alone; the section does not provide for any greater apportioning of expenses among types of strata lots. As worded, the section serves to burden the owners of one type of strata lot with an item of expense from which they derive the *only* benefit.” [emphasis added]).

425. See *supra* note 2, s 17.13 (1).

426. *Ibid*, s 17.13 (3).

rules on amending bylaws, such a bylaw was permitted to be “approved by a resolution passed by a majority vote at an annual or special general meeting.”⁴²⁷

The transitional provisions also provided that, “if a strata corporation [had] adopted and filed a ‘types’ bylaw prior to July 1, 2000, and that bylaw provided for the apportionment of contributions to the contingency reserve fund of a strata corporation or a section based on the type of strata lot, the bylaw remains enforceable even after January 1, 2002.”⁴²⁸

These transitional provisions have caused some difficult problems in practice, which have resulted in a stream of court cases considering them.⁴²⁹ Reflecting on the complexity of the provisions and the issues that they raised, one judge has said they could be characterized as a “minefield” for non-specialists.⁴³⁰

Powers, duties, and governance

“The recognition of ‘types’ within a strata corporation,” notes a leading practice guide, “does not give rise to separate legal entities, as is the case with a strata corporation and sections.”⁴³¹ Instead, a types bylaw “empowers” the broader strata corporation to make expense allocations for its operating budget.⁴³²

Since types are not “mini strata corporations”⁴³³ after the fashion of sections, the act does not contain any provisions relating to the governance of types. While the act has extensive provisions on the rights and responsibilities of sections,⁴³⁴ and while it requires the creation of a section executive to oversee the section’s handling of its

427. *Ibid*, s 17.13 (4).

428. Baker & Walker, *supra* note 91 at 1.1.19. See also *Strata Property Regulation*, *supra* note 2, s 17.11 (6) (“Subsection (5) [declaring bylaw void if it is in conflict with parts 1–17 of the act or with the regulation] does not apply to a bylaw that was filed in the land title office before July 1, 2000 to the extent that the bylaw provides for the apportionment of contributions to a contingency reserve fund as a common expense according to type of strata lot, if that type of strata lot is a type identified in the bylaws of the corporation or a section.”).

429. See e.g. *Strata Corp LMS 509 v Andresen*, 2001 BCSC 201, 102 ACWS (3d) 1007; *Strata Plan LMS608 v Strata Plan LMS608*, [2001] BCJ No 2116 (QL) (SC); *Alvarez*, *supra* note 84; *Wilfert v Ward*, 2004 BCSC 289, 25 BCLR (4th) 391 [Wilfert].

430. *Alvarez*, *supra* note 84 at para 109.

431. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 18.15.

432. See *ibid*.

433. *Lim*, *supra* note 121 at para 48, Boyd J.

434. See *supra* note 1, ss 190–98.

rights and responsibilities,⁴³⁵ no such equivalents exist in the legislation or in the regulation for types.

Cancellation

Neither the act nor the regulation sets out any special rules for cancelling a type. It appears that a type may be cancelled by repealing or amending the bylaw that identifies types of strata lots.⁴³⁶

ISSUES FOR REFORM

Introduction

The project committee understands that types are working reasonably well on the ground. Their streamlined administration, coupled with their limited reach, apparently makes them quite useful. A case could be made that they should be employed more widely than at present, as more of an alternative to sections.

The proposals that follow tend to involve fine-tuning reforms. Many are directed at giving types a firmer footing within the *Strata Property Act*. Nevertheless, the committee thought it was important to set out a top-to-bottom review of the major aspects of types. This approach helped it to refine its own proposals. And setting out a greater range of issues allows for broader comment on the fundamental features of types.

The issues for reform that follow are grouped into the six subjects that were addressed earlier, as part of the background information on types: (1) legislative enabling provision or definition; (2) creation; (3) sharing operating expenses; (4) sharing capital expenses; (5) powers, duties, and governance; (6) cancellation.

435. See *ibid*, s 196 (2).

436. See *ibid*, s 128 (bylaw amendment procedures).

ISSUES FOR REFORM—LEGISLATIVE ENABLING PROVISION OR DEFINITION

Should the Strata Property Act contain a provision expressly enabling the creation of types of strata lots?

Brief description of the issue

The *Strata Property Act* doesn't mention types. Instead, types are dealt with in a handful of provisions in the regulations addressing the sharing of expenses paid for with funds from a strata corporation's operating fund⁴³⁷ and transitions from the old *Condominium Act*⁴³⁸ to the *Strata Property Act*.⁴³⁹

The lack of an express statutory grounding for types has the potential to create uncertainty. A strata corporation's planning using types could be met with arguments about its validity that could only be refuted after a careful and time-consuming counterargument. Should the act contain a provision that expressly allows the creation of types?

Discussion of options for reform

The committee considered two options for reform: amending the act to add an enabling provision for types or retaining the current law, which doesn't address types in the legislation and simply sets out rules regarding the budgetary implications of types and transitions from the *Condominium Act* in the regulation.

A legislative enabling rule would bring enhanced clarity and certainty to the legal framework. It would limit the ways in which the validity of a strata corporation's use of types could be challenged. An argument that the law lacks a general authorization for types would be taken off the table. A statutory enabling provision could also bring higher visibility for types, promoting their use as a potential answer to cost-sharing problems in cases that don't call for the more wide-ranging solution provided by sections.

There are potential drawbacks to amending the legislation, which would also provide some support to retaining the status quo. First and foremost, it doesn't appear

437. See *supra* note 2, ss 6.4 (2), 11.2 (2).

438. *Supra* note 16.

439. *Supra* note 2, s 17.13.

that the lack of an enabling provision in the act is causing any concerns about the validity of types to arise in practice. Addressing concerns about validity may be premature, at best. Adding an enabling provision would lengthen the act, adding somewhat to its complexity.

The committee's tentative recommendation for reform

The committee favours adding an enabling provision for types to the *Strata Property Act* for the sake of certainty. Although no one has questioned the validity of types created under the current law, any potential argument should be addressed before it can create any mischief. Further, having the legislation expressly recognize types will support subsequent tentative recommendations made in this chapter, some of which call for other amendments to the act.

The committee tentatively recommends:

30. The Strata Property Act should contain a provision that expressly enables the creation of types of strata lots.

ISSUES FOR REFORM—CREATION

Should the Strata Property Act require a strata corporation that wishes to create types of strata lots to obtain approval of this decision at a general meeting by adoption of resolutions passed by 3/4 votes of both eligible voters in the type and all eligible voters in the strata corporation?

Brief description of the issue

The only rules that appear to bind a strata corporation in creating types are the general rules for creating or amending bylaws.⁴⁴⁰ This means that types may be created without the express consent of owners of strata lots within the type. Should the act contain a mechanism that would allow them to vote independently on the creation of a type?

440. See *Strata Property Act*, *supra* note 1, ss 126–28.

Discussion of options for reform

There are a number of ways to structure rules that would give types owners a greater say in the creation of types. The committee focussed on proposals that would draw on the existing provisions governing creation of sections.⁴⁴¹

The advantage of this proposal is that it would set out a clear procedure for the creation of types. The proposal draws on a familiar procedure for creating sections. Finally, it would add a measure of protection for the strata-lot owners in the proposed type.

But the proposal may come at the cost of increased time and administrative complexity. An additional vote, among the eligible voters in the type, would have to be organized. Conflicts could result, for example, if the broader strata corporation favoured creating types but the type owners resisted. This could be seen to undermine one of the identified purposes of types, which is to protect owners generally from expenses that only benefit the owners of a certain type of strata lot.

The committee's tentative recommendations for reform

The committee decided that the legislation should clearly spell out the procedure for a strata corporation that wants to create types. The committee favours harmonizing that procedure with the existing procedure for a strata corporation creating sections.

The committee tentatively recommends:

31. The Strata Property Act should require, for a strata corporation to create a type of strata lot: (a) the strata corporation must hold an annual or special general meeting to consider the creation of the type; (b) the notice of meeting must include a resolution to amend the bylaws to provide for the creation of each type; and (c) the resolution referred to in (b) must be passed (i) by a 3/4 vote by the eligible voters of the strata lots comprising the type identified in the bylaw, and (ii) by a 3/4 vote by all the eligible voters in the strata corporation.

The committee also favours adopting a rule requiring resolutions to be passed by a 3/4 vote in all cases, to parallel its similar proposal for sections.⁴⁴²

441. See *ibid*, s 193.

442. See above at 66–67.

The committee tentatively recommends:

32. The vote authorizing the creation, amendment, or cancellation of a type should require a resolution passed by a 3/4 vote in all cases, despite the provisions of section 128 (1) (b) and (c), which allow amendments to a bylaw to be approved by a resolution passed by a voting threshold other than a 3/4 vote in the case of a strata plan composed entirely of nonresidential strata lots or in the case of a strata plan composed of both residential and nonresidential strata lots.

Finally, the committee favours ensuring that amendments to bylaws creating types must also be passed by 3/4 votes of the broader strata corporation and the eligible voters of strata lots in the type.

The committee tentatively recommends:

33. If a strata corporation allocates expenses by types, then amendments to the strata corporation's bylaws concerning the allocation of an expense to a type must be approved at an annual general meeting or a special general meeting by both a resolution passed by a 3/4 vote of the strata corporation and a resolution passed by a 3/4 vote of the type.

Should the Strata Property Act allow an owner-developer to create types of strata lots at the time the strata plan is deposited in the land title office?

Brief description of the issue

The act and the regulation appear to implicitly allow an owner-developer to create types. In light of earlier proposals, which call for a procedure to be set out in the act for a strata corporation to create types, should the act be amended to expressly provide for an owner-developer to create types?

Discussion of options for reform

Amending the act to expressly provide for creation of types by an owner-developer would have a number of advantages. It would make the legislation clearer and more explicit. It may help to raise the profile of types, making them more of a consideration during the planning and development phases of a strata-property project. And it would support other committee proposals intended to create a legislative home for provisions on types.

The only potential downside of this proposal is that it could be viewed as redundant. The act and the regulation implicitly allow an owner-developer to create types. At a

minimum, there appears to be nothing that would prevent an owner-developer from doing this. So adding an express provision to the legislation could be seen as being unnecessary.

The committee's tentative recommendation for reform

The committee favours the clarity that would result from having the act expressly acknowledge that an owner-developer can create types. This proposal would also be of a piece with its other proposals on the creation of types.

The committee tentatively recommends:

34. The Strata Property Act should allow an owner-developer to create types of strata lots at the time the strata plan is deposited by filing in the land title office bylaws that provide for the creation of each type.

ISSUES FOR REFORM—SHARING OPERATING EXPENSES

Should the Strata Property Regulation allow operating expenses (expenses that usually occur either once a year or more often than once a year) to be shared by types of strata lots?

Brief description of the issue

The central purpose of types is to allow cost sharing of operating expenses. The *Strata Property Regulation* currently enables this purpose if types of strata lots are identified in a strata corporation's bylaws. Should it continue to do so?

Discussion of options for reform

There are only two options for this issue: retain the current law or repeal it.

The current law hasn't attracted any published criticism. It appears to work well in meeting its limited purposes. Types allow for a streamlined form of cost sharing, without the administrative requirements associated with sections or the difficulty of obtaining a change to the basis of contribution to a strata corporation's operating funding, which must be approved by a resolution passed by a unanimous vote.⁴⁴³

Nevertheless, there may be reasons to eliminate types from the legal framework. Types do overlap considerably with sections. An argument could be made that the

443. See *Strata Property Act*, *supra* note 1, s 100.

law would be simpler if it only employed one tool for managing cost sharing in complex stratas.

The committee's tentative recommendation for reform

The committee favours retaining types as a tool for varying the general cost-sharing rule for operating expenses. The committee understands that types work well for this purpose. It raised this issue primarily to ensure that all aspects of types are examined in this consultation paper and to determine if there is any sentiment for changing this part of the legal framework.

The committee tentatively recommends:

35. The Strata Property Regulation should continue to allow operating expenses (expenses that usually occur either once a year or more often than once a year) to be shared by types of strata lots.

Should the Strata Property Regulation allow operating expenses (expenses that usually occur once a year or more often than once a year) to be shared by types of strata lots, even if the expense is in relation to an item that does not exclusively benefit the type?

Brief description of the issue

The *Strata Property Regulation* allows a strata corporation to depart from the general rule on cost sharing “if a contribution to the operating fund relates to and benefits only one type of strata lot.”⁴⁴⁴ Case law provides that the regulation can only be invoked for operating expenses that benefit a type “exclusively.”⁴⁴⁵ Should this approach be relaxed to allow for cost sharing by type even if the expense only partially benefits the type?

Discussion of options for reform

A relaxed rule for sharing operating expenses by types could have several advantages. For one, it could align the law more closely with the expectations and experiences of owners in complex stratas. It would give strata corporations greater flexibility and more options in managing expense allocation. And it might raise the

444. *Supra* note 2, s 6.4 (2).

445. *Ernest & Twins*, *supra* note 416 at para 18.

profile of types and promote their use in situations in which types would prove to be a better fit for a strata corporation than sections.

Relaxing the current rule could have some downsides, which also serve to bolster the status quo. The current rule has the advantages of clarity and simplicity. Moving to a rule that allows for sharing of expenses that partially benefit a type will result in a cost-sharing regime that is more complicated and difficult to administer. A less clear-cut approach to types could also breed conflict among owners, who might differ in how to apply cost sharing by types in marginal cases.

The committee's tentative recommendation for reform

The committee gave this issue lengthy consideration, ultimately deciding to propose retaining the current approach. The committee's discussion focussed on examples where a relaxed rule could benefit strata corporations and strata-lot owners. One example concerned natural-gas expenses for fireplaces. As usage of the fireplaces may differ, a more fine-grained rule for cost sharing than is currently allowed by the rules on types might be desired. But the committee noted that there are practical hurdles to implementing such a usage-based approach. In the end, the committee favoured the administrative clarity and simplicity of the current rule.

The committee tentatively recommends:

36. The Strata Property Regulation should not allow operating expenses (expenses that usually occur once a year or more often than once a year) to be shared by types of strata lots, if the expense is in relation to an item that does not exclusively benefit the type.

Should the Strata Property Act require a strata corporation with types to have a year-end reconciliation of expenses allocated to a type?

Brief description of the issue

The *Strata Property Regulation* doesn't directly address what happens if actual expenses for an item in a strata corporation's operating budget that has been allocated to a type of strata lot end up being greater or less than the budgeted amount. Section 105 of the act addresses budget surpluses and deficits generally, but it doesn't contain anything specifically geared to types. Although the current practice appears to be to turn to the owners of the type of strata lot to make up any shortfall, nothing in the act or the regulation clearly requires this result. Should the act be amended to deal with budgetary surpluses or deficits on expense items allocated to a type?

Discussion of options for reform

There are essentially two options that respond to this issue: amend the act to provide instructions for strata corporations on how to deal with surpluses and shortfalls or retain the current approach, which is silent on the topic.

The main advantage of an amendment is clarity. The legislative provision would give direct guidance to a strata corporation facing this issue. Budgetary surpluses and deficits can occur frequently in practice, as certain expenses may be difficult to predict. A legislative provision that spells out the consequences of each would simplify administration of a strata corporation that relies on types for cost sharing. Potentially, such a provision could also help to support the enhanced use of types as a cost-sharing tool.

An argument could be made that a legislative amendment isn't necessary to address this issue. There have been no public calls for legislation and it appears that strata corporations can adopt practices that ensure adequate results.

The committee's tentative recommendation for reform

The committee favours placing a clear rule in the act on budgetary surpluses and shortfalls involving types. Both crop up in practice; it would benefit strata corporations if the act addressed this issue.

The committee tentatively recommends:

37. Section 105 of the Strata Property Act should be amended to provide that, if a strata corporation has adopted a bylaw establishing types of strata lots, the strata corporation must carry out a year-end reconciliation and if, based on that reconciliation, there is a surplus or a shortfall with respect to a contribution to the operating fund that was shared only by owners of strata lots of that type, then the surplus or shortfall must be dealt with as follows: (a) in the case of a surplus, the surplus must be used to reduce the total contribution to the next fiscal year's operating fund by owners of strata lots of that type; (b) in the case of a shortfall, the shortfall must be eliminated during the next fiscal year by owners of strata lots of that type.

ISSUES FOR REFORM—SHARING CAPITAL EXPENSES

Should the Strata Property Regulation allow capital expenses (expenses that occur less frequently than once a year) to be shared by types of strata lots, if the expense is in relation to an item that exclusively benefits the type?

Brief description of the issue

Types may only be used to vary the act's general rules on cost sharing in relation to "a contribution to the operating fund [that] relates to and benefits only one type of strata lot."⁴⁴⁶ So, for example, in a strata property consisting of an apartment building and townhouses, expenses related to the regular maintenance and upkeep of the building's elevators may be allocated to apartment strata-lot owners. But when the time comes to replace an elevator, this capital expense must be borne by the strata corporation as a whole. Should types be expanded to encompass capital expenses, as well as operating expenses?

Discussion of options for reform

The options for this issue are essentially two: expanding the reach of types so that they embrace capital expenses, or standing pat on the current rules, which limit the scope of types to operating expenses.

Expanding the circumstances in which types may be used to share expenses would give strata corporations greater flexibility in structuring their affairs. Strata corporations could embrace a broader form of cost sharing that would come without the administrative complexity that results from creating sections.

Allowing for sharing of capital, in addition to operating, expenses would also support the legislative purpose for types, which involves protecting owners of one type of strata lot from having to pay costs that are exclusively for the benefit of another type of strata lot.⁴⁴⁷ Limiting types to operating expenses leaves this legislative goal only partially fulfilled.

446. *Strata Property Regulation*, *supra* note 2, s 6.4 (2). See also *ibid*, s 11.2 (2) (parallel rule for types in a section).

447. See *Westminster Savings*, *supra* note 385.

Finally, expanding the reach of types would not be a leap into the unknown. It would simply restore the law to where it stood before the advent of the *Strata Property Act*. The long experience with full cost sharing under the *Condominium Act* should help to allay any practice concerns that could crop up from changing the law.

The rationale for the current, limited scope of types appears to be that it fits into a broader system for cost sharing under the *Strata Property Act*. As one judge explained, the “solution” for owners who wish to allocate costs more specifically is to “establish separate sections, each with an operating and a contingency reserve fund.”⁴⁴⁸

The comparatively informal nature of types could also cause problems for sharing capital expenses. When this is done with sections, each section is a separate entity from the strata corporation and each has (or should have) its own contingency reserve fund. With types, on the other hand, expenses would be allocated with respect to a single (strata-corporation) contingency reserve fund. There were concerns under the *Condominium Act* that this approach would result in capital expenses not being properly allocated in practice.⁴⁴⁹

The committee’s tentative recommendation for reform

Among all the issues on types, this one commanded the greatest share of the committee’s attention. The committee gave extended consideration to extending types’ cost-sharing rules to capital expenses. This option seemed particularly attractive because it appeared to allow a way to build on the successes of types and tackle some of the shortcomings of sections. If owner-developers and strata corporations were given a way to couple a flexible cost-sharing regime with a streamlined administrative structure they might in the future gravitate toward types and avoid the challenges many have found with sections.

But the more the committee discussed proposing this reform, the more it realized that it couldn’t simply leave things at that. Other rules, covering financial accountability, administration, and even the beginnings of a governance structure for types,

448. *Wilfert, supra* note 429 at para 31, Melvin J.

449. See *Fairweather & Ramsay, supra* note 262 at § 10.39 (“[T]he [*Condominium*] Act does not permit the strata corporation to divide the reserve into percentages allocable to particular types of strata lots. Nor does it permit the strata corporation to charge owners of strata lots that enjoy the exclusive use of common property or facilities to contribute a higher percentage to the reserve than other owners. As a result, using the previous example, the strata corporation may pay for capital repair or replacement of balconies from the contingency reserve to which commercial as well as residential owners have contributed.”).

would also have to be contemplated and, in all likelihood, adopted. In the absence of such rules, expanding the scope of types would also, inevitably, expand the scope for issues involving types—particularly if a type were allowed to have its own contingency reserve fund. But adopting such rules causes another dilemma. Adding these features to types would have the effect of duplicating just those qualities of sections that have caused such administrative trouble. It would be more than ironic if reforms ended up remaking types into an echo of sections.

Faced with these concerns, and buoyed by the understanding that types in their limited form have proved effective for their purposes, the committee ultimately came to the view that the current approach should be retained.

The committee tentatively recommends:

38. The Strata Property Regulation should not allow capital expenses (expenses that occur less frequently than once a year) to be shared by types of strata lots, even if the capital expense relates to an item that benefits only the type of strata lot.

Should the Strata Property Act allow a type to have a contingency reserve fund?

Brief description of the issue

This issue may appear to be academic in light of the committee's tentative recommendation for the previous issue. But the committee is interested in hearing from people who may support expanding the scope of types on additional issues that could arise in connection with an expanded form of types.

The genesis of this issue is in committee discussions of the previous issue. As noted earlier, one of the dilemmas the committee faced in considering whether to allow sharing of capital expenses by types was that this reform would appear to entail building new governance rules into the types regime, which would detract from the streamlined administrative framework for types. One potential way out of this dilemma that the committee considered would be to allow cost sharing of capital expenses by type but to make it clear that a type could not have its own contingency reserve fund. This would mean that special levies would be the necessary means to raise funds for capital expenditures by types. Would this approach be an acceptable compromise, one which allows for an enhanced form of cost sharing without the full-scale governance trappings that sections require?

Discussion of options for reform

There are three options to consider. They each relate back to the previous issue. One option is to favour sharing of capital expenses by type and to favour allowing a type to have a contingency reserve fund to support this approach to cost sharing. A second option is to be opposed on both counts. And a third approach is to favour sharing of capital expenses but not to favour contingency reserve funds for types.

The first option would allow for the most expansive conception of what types could be. A contingency reserve fund would enable greater planning and saving by the type. This would allow for a more extensive use of cost sharing for capital expenses by type. But it would also call for a governance structure to ensure that the fund is properly managed.

The second option is consistent with retaining the current, limited approach to cost sharing by type.

The third option holds out the prospect that types could be enlarged in scope without simultaneously acquiring the administrative complexity that attaches to sections. The downside to this approach is that it could still open the door to challenges. Without a clear governance structure for a type it would be difficult to determine whether payment of funds out of a type contingency reserve fund were properly authorized. It would also run counter to the emphasis on long-range financial planning that is evident in recent amendments to the act⁴⁵⁰ and the regulation⁴⁵¹ concerning depreciation reports.

The committee's tentative recommendation for reform

Since the committee doesn't favour expanding cost sharing by types to capital expenses, it logically also doesn't favour allowing a type to have a contingency reserve fund.

The committee did consider the compromise position represented by allowing types to be responsible for capital expenses but not allowing them to have a contingency reserve fund. There is some attractiveness to this idea, as on the surface it holds out the prospect of creating a greater role for types while preserving their administrative simplicity. But the committee was concerned about the message this would send at a time when public policy is increasingly directed to encourage strata corpora-

450. See *supra* note 1, s 94.

451. See *supra* note 2, s 6.2.

tions to plan and save for future capital expenses. Giving types responsibility for capital expenses and then effectively requiring them to pay for these expenses only by special levies would run directly counter to the broader trend in managing capital expenses.

The committee tentatively recommends:

39. The Strata Property Act should not allow a type of strata lot to have a contingency reserve fund.

Should the Strata Property Regulation allow capital expenses (expenses that usually occur less frequently than once a year) to be shared by types of strata lots, even if the expense is in relation to an item that does not exclusively benefit the type?

Brief description of the issue

This is the parallel issue to the earlier issue that asked whether readers favour allowing a strata corporation to share operating expenses with a type, even if those expenses don't exclusively benefit the type. This issue asks whether readers who favour allowing capital expenses to be shared with types would also favour going a step further and allow cost sharing by type even for capital expenses that don't exclusively benefit the type.

Discussion of options for reform

The options, and their advantages and disadvantages, are similar for this issue to the options for the earlier issue. Allowing cost sharing in these circumstances would give strata corporations greater flexibility and could enhance the utility of types. But these advantages would come at a cost of greater administrative.

The committee's tentative recommendation for reform

As noted in previous tentative recommendations, the committee doesn't favour expanding cost sharing by type to embrace either capital expenses or expenses that don't exclusively benefit the type. So it logically doesn't favour a proposal that would combine both of these ideas. As noted in discussing the earlier proposals, the committee would view such a reform as bringing an undesirable level of complexity to types.

The committee tentatively recommends:

40. The Strata Property Regulation should not allow capital expenses (expenses that usually occur less frequently than once a year) to be shared by types of strata lots, if the expense is in relation to an item that does not exclusively benefit the type.

ISSUES FOR REFORM—POWERS, DUTIES, AND GOVERNANCE

Should the Strata Property Act give types authority over common property, common assets, and strata lots?

Brief description of the issue

This issue harkens back to a pair of similar issues posed for sections.⁴⁵² It's included here to give further opportunity for readers to comment on how far they would like to see the types concept extend. Previous issues have raised cost sharing for capital expenses. This issue asks readers to consider control-of-property issues in relation to types.

A strata corporation has authority over the “common property, common assets, and strata lots” of a strata property. Neither sections nor types are granted this authority under the current act. The committee does propose to give sections authority over common assets and strata lots of the section.⁴⁵³ Should the act extend to types the power and the duty to address issues arising from the common property, common assets, and strata lots of the type?

Discussion of options for reform

The main rationale for this proposed reform is to bolster types as a viable alternative to sections and thereby to give strata corporations more options and greater flexibility in structuring their affairs.

The main drawback is that it would be very difficult to craft legislation giving types these enhanced powers and duties without also repeating the corporate structure used for sections. This sets up a dilemma: if types retain their informal, non-corporate nature and gain enhanced powers and duties, then this could set the stage for abuses and a lack of accountability; if types acquire a corporate structure to go along with enhanced powers and duties, then they risk becoming an echo of sections.

452. See above at 70–74.

453. See above at 74 (tentative recommendation no. (10)).

The committee's tentative recommendation for reform

Because of the practical and administrative problems that would be the likely result of this proposal, the committee doesn't favour authorizing types to be responsible for common property, common assets, or strata lots of the type.

The committee tentatively recommends:

41. The Strata Property Act should not authorize bylaws respecting types to provide for the control, management, maintenance, use, and enjoyment of the strata lots, common property, and common assets of the type or adjacent to the type.

Should the Strata Property Act require types to have an executive?

Brief description of the issue

Currently, neither the act nor the regulation imposes any governance structure on types. This approach is not surprising. It is consistent with the limited cost-sharing role that types play under the act.

But if types were to acquire greater scope for cost sharing and greater authority over property, then it could become important to provide some structure to types' decision-making processes. One way to do this would be to adapt the key feature of sections', and strata corporations', governance and require a type to have an executive council. Should the act take this step?

Discussion of options for reform

There are only two options for this issue: either amend the act to require types to have an executive or retain the current arrangement, which doesn't call for a types executive.

An executive would help to ensure that types are fulfilling any responsibilities that are assigned to them under reforms to the legislation. It would also help to coordinate the larger group of owners within a type and ensure that they are making timely and effective decisions.

The downside of requiring an executive is that it would chip away at the informal nature of types, making them somewhat more bureaucratic and entrenched. At some point, a more entrenched version of types may begin to take on the negative qualities of and raise the operational issues related to sections.

The committee's tentative recommendation for reform

Since the committee doesn't favour an expanded role for types, it isn't of the view that types should be required to have an executive.

The committee tentatively recommends:

42. *The Strata Property Act should not require that bylaws respecting types provide for the creation of a type executive.*

ISSUES FOR REFORM—CANCELLATION

Should the Strata Property Act require a strata corporation that wishes to cancel types of strata lots to obtain approval of this decision at a general meeting by adoption of resolutions passed by 3/4 votes of both eligible voters in the type and all eligible voters in the strata corporation?

Brief description of the issue

The *Strata Property Act* doesn't contain special rules regarding cancellation of a type of strata lot. The general provisions in the act relating to repeal of bylaws would apply to repealing a bylaw that identified a type of strata lot.⁴⁵⁴ Earlier in this consultation paper,⁴⁵⁵ the committee proposed amending the act to require the consent of owners of a type of strata lot to bylaws that create the type or to bylaw amendments involving the type bylaw. Should this rule be extended to the repeal of a bylaw identifying a type?

Discussion of options for reform

Some of the advantages of this proposed amendment were noted earlier. It would guard against any potential abuses of owners in the type, who would likely lack the voting power that could be marshalled by the broader strata corporation. It would also set out a clear procedure to follow in cancelling a type. Finally, this proposal would ensure consistency with the committee's earlier tentative recommendations.

454. *Supra* note 1, s 128.

455. See above at 121–22.

The downside of this proposal is that it would add to the complexity of cancelling a type. There could be conflicts if type owners and other owners had different views on the question. It might also increase the administrative burden on a strata corporation with types.

The committee's tentative recommendation for reform

The committee favours extending its procedure for adopting bylaws to create types to amending bylaws to cancel types.

The committee tentatively recommends:

43. The Strata Property Act should require, for a strata corporation to cancel a type of strata lot: (a) the strata corporation must hold an annual or special general meeting to consider cancellation of the type; (b) the notice of meeting must include a resolution to amend the bylaws to provide for the cancellation of the types; and (c) the resolution referred to in (b) must be passed (i) by a 3/4 vote by the eligible voters of the strata lots comprising the type identified in the bylaw, and (ii) by a 3/4 vote by all the eligible voters in the strata corporation.

CHAPTER 5. PHASES

BACKGROUND

Overview

This chapter examines the complex and highly detailed rules on phasing—developing a strata property in pieces over an extended period. These rules largely focus on establishing procedures for creating phases and on how the interests of an owner-developer and incoming strata-lot owners may be balanced in a phased strata property. To place some organization on these detailed rules, this background portion of the chapter highlights the following themes:

- Applying to deposit a phased strata plan:
 - Phased Strata Plan Declaration;
 - approval by an approving officer.
- Changing circumstances—amending the Phased Strata Plan Declaration:
 - extending the time to make an election to proceed;
 - electing not to proceed;
 - other amendments to the declaration.
- Governance and phased strata plans:
 - owner-developer’s responsibilities;
 - annual general meeting after deposit of a subsequent phase;
 - budgets and finances in a phased strata plan.
- Protecting the financial interests of owners in a phased strata plan:
 - security for common facilities;
 - the owner-developer’s contribution to common expenses;
 - cost sharing and phases.

The bulk of the pages that follow is taken up with examining the current rules on phasing found in the *Strata Property Act* and the *Strata Property Regulation*. This information is surrounded on either side with a brief look at the legislative history of phasing in British Columbia and salient points on phasing in other jurisdictions in Canada and Australia. But before delving into the details of the law, this chapter begins with a few big-picture topics: the meaning of the word *phase* in the legislation,

the policy goals that phasing legislation intends to achieve, and the advantages and disadvantages of developing a strata property in phases.

Meaning of “phase”

Phase is a term of art in the *Strata Property Act*. Real-estate projects that are colloquially referred to as phased developments may not necessarily feature phases in the sense that is relevant for this consultation paper.⁴⁵⁶ That is, these developments may or may not be what the act calls *phased strata plans*.⁴⁵⁷ Phased strata plans must comply with the detailed and exacting procedural requirements set out in the act and the regulation to guide development of a strata property, over a period of time, in separate phases.

Policy goals of phases

Why did the legislature go to the effort of crafting an extensive set of provisions to define and regulate phased strata plans? The provisions appear to be designed to achieve two policy goals.

Commentators have identified the main purpose of legislation on phases as expanding the number of real-estate developers that are able to take on and complete large-scale strata developments.⁴⁵⁸ “Without the benefit of phasing,” as a leading practice guide puts it, “an owner developer would be unable to build additional strata lots as part of the same strata development. Phasing permits an owner developer to divide a piece of land into a number of segments and then develop each segment of the

456. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.2 (“A phased strata plan should not be confused with the development industry’s common use of the term ‘phases’ to mean multiple stages of a master-planned residential, recreational, or commercial project. In such a case, the underlying land may be divided into several parcels of land from which subdivided lots, strata plans, or phased strata plans will be created. This is not necessarily a phased strata plan, although it may be. Until a parcel of land is developed as a phased strata plan under the Act, it is not truly a ‘phase’ in the sense contemplated by the Act.”).

457. See *Strata Property Act*, *supra* note 1, s 1 (1) “phased strata plan” (“means a strata plan that is deposited in successive phases under Part 13”).

458. See Dennis J Pavlich, *Condominium Law in British Columbia* (Vancouver: Butterworths, 1983) at 43 (“In order to meet the complaint raised by certain developers that the Strata Titles Act precluded the development of large projects, the legislature responded with the concept of a phased strata plan. Previously, only corporations with huge financial resources could develop a project that would encompass various designs, dwelling styles and types of uses. The concept of a phased strata plan was introduced to put sophisticated projects within the reach of a larger number of developers.”).

property in sequence.”⁴⁵⁹ Absent this ability to develop land into a strata property in such segments, only major developers with considerable financial resources could carry out large-scale, sophisticated strata-property developments.

While the general public benefits from increased competition in the development field and from the heightened diversity of strata properties, phasing can also cause some problems for potential purchasers and strata-lot owners. Purchasers may not appreciate that developing a strata property in phases creates the risk that events may cause the plan for development to be altered significantly or derailed entirely. Phasing also means that strata-lot owners and the owner-developer will be in a legal relationship over a longer period of time than is typically the case in a strata-property development. Legislation has been enacted to address these concerns. So, instead of a simple enabling provision, legislation on phases is a complex balancing act, with detailed provisions on disclosure, strata governance, finances, and cost sharing.

This balancing act reflects the fact that the policy goals of the legislation may often be in tension. These tensions ultimately derive from the different interests of developers of phased strata plans and the eventual purchasers of strata lots in those phased developments. Those interests are highlighted in considering the advantages and disadvantages of proceeding with a real-estate development by way of a phased strata plan.

Advantages and disadvantages of phases

The advantages and disadvantages that flow from phasing a strata-property development differ for owner-developers and strata-lot owners. This can be seen by compiling lists of the two, which are taken from commentary on phased strata plans.⁴⁶⁰

Commentators have noted the following advantages to phasing:

- **flexibility:** this is primarily an advantage for owner-developers, who can use the longer timelines of a phased development to respond to changes in market conditions;⁴⁶¹

459. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 1.16.

460. See especially *ibid* at §§ 17.5–17.10.

461. See *ibid* at § 17.6. See also Fanaken, *supra* note 9 at 153 (“[Phasing] is essentially an efficient marketing scheme.”).

- **enhanced access to construction financing:** another advantage for owner-developers, for whom the “ability to initiate cash flow from the sales of strata lots near the beginning of the project is a key advantage to developing land by way of a phased strata plan”;⁴⁶²
- **increased capacity for development of common facilities:** strata-lot owners may benefit as “costly amenities such as clubhouses, swimming pools, tennis courts, become economically feasible when shared between the occupiers of several large buildings.”⁴⁶³

And commentators have found that phasing has the following disadvantages:

- **strictness in planning for common facilities:** the “owner developer has to make decisions and commitments about ‘common facilities,’ ” notes a practice guide, “that may not make economic sense down the road”;⁴⁶⁴ and the act makes it difficult to undo these decisions and commitments;
- **rigidity of procedural requirements:** the enhanced consumer-protection and governance provisions result in some rigid procedural requirements for owner-developers, making it difficult to change things once the phasing process is underway;⁴⁶⁵
- **people issues:** this topic refers to the “continuing relationship between the owner developer and the strata lot owners in the constructed phases,”⁴⁶⁶ which adds to the complexity of governing a strata property.

It’s important to keep this broader view of the goals, advantages, and disadvantages of phasing in mind as this chapter turns now to the details of British Columbia’s approach to phased strata plans.

462. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.7.

463. Pavlich, *supra* note 458 at 43.

464. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.8.

465. See *ibid* at § 17.9 [“Once the Phased Strata Plan Declaration . . . is filed at the land title office, it is not easy to change. The timing of each phase needs to be carefully planned to reduce the need for changes.”].

466. *Ibid* at § 17.10.

History of phasing in British Columbia strata-property legislation

1966 Strata Titles Act

British Columbia's first-generation act⁴⁶⁷ didn't contain anything enabling a strata property to be developed in phases.

1974–2000 Strata Titles Act to Condominium Act

Provisions enabling phased strata plans first appeared in the second-generation act.⁴⁶⁸ Part 2 of the 1974 act contained nine sections,⁴⁶⁹ which addressed all four topics highlighted for consideration in this chapter.

- **Applying to deposit a phased strata plan.** The act directed a registrar of land titles to refuse to “accept a phased strata plan for deposit”⁴⁷⁰ unless it was accompanied by a form called a Declaration of Intention to Create a Strata Plan by Phased Development.⁴⁷¹ This declaration required the approval of an approving officer.⁴⁷² The act also required each phase to be “clearly identified”⁴⁷³ and each phase, upon deposit, to comply with general requirements for strata plans.⁴⁷⁴
- **Changing circumstances.** The Declaration of Intention to Create a Strata Plan by Phased Development required the applicant to set out the dates on which the applicant planned to “elect whether or not to proceed with each phase.”⁴⁷⁵ Sometimes the circumstances surrounding a phased strata property change, prompting the owner-developer to rethink its plans for developing the property. The 1974 act allowed the owner-developer to “apply to

467. *Supra* note 13.

468. *Supra* note 14.

469. *Ibid*, ss 42–50.

470. *Ibid*, s 42 (2).

471. See *ibid*, fourth schedule, form E.

472. See *ibid*. The 1974 act defined “approving officer” to mean “(a) where the land affected by a strata plan is situated within a municipality, a person designated as approving officer by the council of the municipality in which the land is situated; or (b) where the land affected by a strata plan is not situated within a municipality, a person as approving officer by the regional board of the regional district in which the land is situated” (*ibid*, s 1 (1)).

473. *Ibid*, s 42 (2) (b).

474. See *ibid*, s 42 (2) (c).

475. *Ibid*, fourth schedule, form E, s 3.

the approving officer for an extension or extensions of time to make the election.”⁴⁷⁶ If the owner-developer ultimately decided not to proceed, it was required to give notice broadly⁴⁷⁷ and the decision could be the subject of a court proceeding over the impact of it on the phased strata property’s common facilities.⁴⁷⁸

- **Governance and phased strata plans.** The 1974 act contained a special governance rule for strata councils in phased strata plans. Whenever a phase, “other than the first phase,” was deposited in the land title office, the strata council was required, within three months of the date of deposit, to “call a general meeting of the purchasers of strata lots included in that phase of the strata plan.”⁴⁷⁹ At that meeting, “two additional members” of the strata council were to be elected “from among the purchasers” in the new phase.⁴⁸⁰ Those additional members maintained their membership in the strata council “until the next annual general meeting of the strata corporation.”⁴⁸¹
- **Protecting the financial interests of owners in phased strata plans.** The 1974 act’s protections for owners in a phased strata plan were largely concentrated on “major common facilities.”⁴⁸² When such common facilities were planned, special approval was required and the owner-developer was called on to post security for their completion.⁴⁸³ Once common facilities were constructed, the owner-developer continued to be liable to “contribute to the common expenses attributable to the common facilities in proportion to the unit entitlement of the phases not yet built.”⁴⁸⁴ The 1974 act also contained a general safeguard against delays in proceeding with planned phases.⁴⁸⁵

476. *Ibid*, s 43 (1). Extensions could only be up to one year; anything more required court approval (*ibid*, s 43 (2)).

477. See *ibid*, s 43 (4).

478. See *ibid*, s 43 (5).

479. *Ibid*, s 49 (1).

480. *Ibid*, s 49 (2).

481. *Ibid*, s 49 (2).

482. *Ibid*, s 45 (1).

483. See *ibid*, s 45.

484. *Ibid*, s 44 (3).

485. See *ibid*, s 43 (7) (“Where the owner-developer does not proceed with the next phase within a reasonable time or at a reasonable rate, the strata corporation may apply to the Court for an or-

These provisions from the second-generation act remained substantially the same—through the 1977 amendments⁴⁸⁶ and the *Condominium Act*⁴⁸⁷—until the advent of the *Strata Property Act* in 2000.

Phases under the Strata Property Act

Introduction

Part 13 of the *Strata Property Act* contains 22 sections dealing with phases.⁴⁸⁸ The *Strata Property Regulation* adds seven more sections⁴⁸⁹ and three forms associated with phased strata plans.⁴⁹⁰ And, finally, there are a number of cases that have a bearing on how phases operate. This all adds up to a complex and detailed legal framework.

The best way to get a handle on this complicated framework is to move thematically through the key events that may arise in the life of a phased strata plan. These themes are the four set out at the start of this chapter, which were also used to structure the discussion of British Columbia's legislative history for phased strata plans. The *Strata Property Act* and the *Strata Property Regulation* represent a mixture of continuity and new approaches in handling these four themes.

Applying to deposit a phased strata plan

Introduction

As is the case for any other kind of strata property, a phased strata is created when a strata plan is deposited in the land title office. But, before a phased strata plan can be

der that the owner-developer complete the phase by a fixed date, or that he elect not to proceed with that phase.”).

486. See *supra* note 15, ss 34 (amending rules on electing not to proceed to allow for applications for other amendments to the declaration, notice to the strata corporation, and allocation of common expenses attributable to common facilities to owner-developer), 35, 36, 37 (changing the trigger for a general meeting of the strata corporation after the deposit of a phase after the first phase to “(a) the date that 60% of the strata lots of the new phase have been conveyed by the owner-developer, or (b) 9 months after the deposit of the strata plan for the new phase”).

487. See *supra* note 16, ss 77–91.

488. See *supra* note 1, ss 217–38.

489. See *supra* note 2, ss 13.1–13.6 (phased strata plans), 17.7 (transitional rules for phased developments).

490. See *ibid*, Form P (Phased Strata Plan Declaration), Form Q (Endorsement of Approval for Phased Strata Plan), Form R (Endorsement for Common Facilities in Phased Strata Plan).

deposited, two special requirements must be met. The owner-developer must provide public disclosure of its phasing plans in a document that goes by the name Phased Strata Plan Declaration. And that declaration must be approved by a public official called an approving officer.

Phased Strata Plan Declaration

The key document for phasing is a prescribed form known as a Form P Phased Strata Plan Declaration.⁴⁹¹ The declaration contains three sections, which call for:

- a declaration of intention “to create a strata plan by way of phased development” on land that the owner-developer owns or holds a right to purchase;
- a description of the “plan of development”; and
- a listing of the dates on which the owner-developer intends to proceed with each phase.⁴⁹²

The second point, the description of the plan of development, requires a high level of detail, setting out substantially how the owner-developer intends to proceed with the phased strata development. The form indicates that the owner-developer should provide the following information:

- a schedule setting out the number of phases in the order in which the phases will be deposited and specifying any common facility to be constructed in conjunction with a particular phase;
- a sketch plan showing
 - all the land to be included in the phased strata plan,
 - the present parcel boundaries,
 - the approximate boundaries of each phase, and
 - the approximate location of the common facilities;
- a schedule setting out the estimated date for the beginning of construction and completion of construction of each phase;
- a statement of the unit entitlement of each phase and the total unit entitlement of the completed development;

491. See *ibid*, Form P.

492. *Ibid*.

Consultation Paper on Complex Stratas

- a statement of the maximum number of units and general type of residence or other structure to be built in each phase.⁴⁹³

Some of these items demand a more careful and intricate view of how the phased strata property will be developed than may be apparent on first reading. Commentators have pointed in particular to the requirement to provide a statement of unit entitlement of each phase and of the total development. Since unit entitlement is, in most cases, based on the habitable area of a strata lot, the “owner developer must have a fairly complete and well-conceived plan for the entire project when preparing the Phased Strata Plan Declaration.”⁴⁹⁴

Approval by an approving officer of a phased strata plan

The Phased Strata Plan Declaration must be deposited in the land title office. But the act requires a registrar of land titles to accept the declaration only if certain conditions are met.⁴⁹⁵ One of these conditions is approval by an approving officer.⁴⁹⁶

The act refers readers to the *Land Title Act* for a definition of *approving officer*.⁴⁹⁷ That act contains a definition of the term that lists various officials corresponding to levels of local government.⁴⁹⁸ For example, the local government of a municipality must designate an approving officer from one of these categories of people:

- the municipal engineer,
- the chief planning officer,
- some other employee of the municipality appointed by the municipal council, or
- a person who is under contract with the municipality.⁴⁹⁹

493. *Ibid.*

494. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.11.

495. See *supra* note 1, s 221.

496. See *ibid*, s 221 (1) (b).

497. See *ibid*, s 1 (1) “approving officer” (“means an appropriate approving officer appointed under the *Land Title Act*”).

498. See *Land Title Act*, *supra* note 100, s 1 “approving officer” (“means, as applicable, (a) the municipal approving officer under section 77, (b) the regional district approving officer under section 77.1, (c) the islands trust approving officer under section 77.1, (d) the Provincial approving officer under section 77.2, (e) the Nisga’a approving officer under section 77.3, or (f) the treaty first nation approving officer appointed under section 77.21”).

499. *Ibid*, s 77 (2).

One of the responsibilities of an approving officer is the approval of subdivision plans.⁵⁰⁰ Requiring approving-officer approval of a Phased Strata Plan Declaration aligns the regulation of phasing with the regulation of subdivision.⁵⁰¹ This level of oversight affords a degree of protection to the public and to purchasers, as the approving officer will examine whether the owner-developer has appropriate plans to develop the phased strata property in a responsible manner.⁵⁰²

The act requires each phase to be submitted to the approving officer for consideration and approval.⁵⁰³ Approval turns on substantial compliance “with the requirements for that phase as set out in the Phased Strata Plan Declaration.”⁵⁰⁴ Additional rules apply if the common facilities are included in the phase.⁵⁰⁵

Approval of the first phase “expires after one year unless the first phase is deposited before that time.”⁵⁰⁶ “This expiry date appears to be absolute,” notes a commentator, “so the owner developer who misses the deadline will have to start over again with a fresh application to the approving officer.”⁵⁰⁷

500. See *ibid*, s 83.

501. See *Strata Property Act*, *supra* note 1, s 228 (1) (a). See also Margaret C. Fairweather, “Conversions, Phasing, Bare Land, Leasehold and Municipal Issues Under the Strata Property Act,” in Continuing Legal Education Society of British Columbia, ed, *Strata Property Act: Materials Prepared for the Continuing Legal Education Seminar, The New Strata Property Act, Held in Vancouver, B.C. on May 11, 2000* (Vancouver: Continuing Legal Education Society of British Columbia, 2000) 5.1 at 5.1.07 (“[T]he [*Strata Property Act*] does not set out any criteria to guide the approving officer in deciding whether or not to approve the Phasing Declaration. A court will likely expect the approving officer to use criteria similar to those the approving officer uses in deciding whether or not to approve a subdivision.”).

502. See e.g. City of Vancouver, “Submission Requirements and Processing Procedures for Phased Strata Proposals,” online: <former.vancouver.ca/commsvcs/developmentservices/subdivision/phasedstratareq.htm> (“As deposit of a phased strata plan is a form of subdivision, the proposal will also be evaluated against the provisions of the City’s Subdivision By-law, with respect to access, servicing and compliance with other relevant by-laws, such as the Vancouver Building By-law, at the proposed phase boundaries. Based on this review, it may be necessary to register legal agreements at the time of the Phase 1 strata plan approval, to address issues such as reciprocal access between phases, or non-compliance with the Vancouver Building By-law at phase boundaries.”).

503. See *supra* note 1, s 221 (1) (b).

504. *Ibid*, s 224 (2).

505. See *ibid*, ss 223, 225.

506. *Ibid*, s 222 (2).

507. Fairweather, *supra* note 501 at 5.1.08.

Upon deposit, the phased strata plan must also comply with general land-title requirements for strata plans.⁵⁰⁸

The approving officer can make an appearance later in the phasing process, if events have caused the owner-developer to seek some changes to its plan to develop subsequent phases. The act's requirements in dealing with changing circumstances are the subject of the next portion of this chapter.

Changing circumstances—amending the Phased Strata Plan Declaration

Introduction

The detailed plan for developing a strata property in phases that is set out in a Phased Strata Plan Declaration may sometimes be affected by events beyond the control of the owner-developer. For example, market conditions may change, resulting in a drying up of demand for the kind of development that was projected or in the tightening up of available financing for the project. When circumstances change, the owner-developer may wish to delay the implementation of planned phases, change aspects of a phased development, or give up on the project altogether. But the owner-developer doesn't have a free hand to do any of these things. Each of these actions must be carried out in accordance with a detailed set of rules. And carrying any of them out, even in complete accordance with the rules, can still bring financial consequences for the owner-developer.

Extending the time to make an election to proceed

The Phased Strata Plan Declaration contains the dates on which an owner-developer is to elect whether or not to proceed with a phase. As the word *elect* implies, the act gives the owner-developer some options on how to proceed. The owner-developer may simply decide to develop the phase as it was mapped out in the declaration. On the other hand, the owner-developer may choose not to proceed with the phase. This option is discussed as the next topic for this chapter.⁵⁰⁹

If the owner-developer does nothing, and the date for making the election passes, then the act says that by default the owner-developer is “conclusively deemed to

508. See *supra* note 1, s 244.

509. See below at 148–49.

have elected to proceed” with the development of a phase on the date contained in the declaration.⁵¹⁰

The final option under the legislation is for the owner-developer to extend the time for making an election. An extension is not automatic: the owner-developer has to “apply to an approving officer for an amendment [to the Phased Strata Plan Declaration] extending the time in which to make the election.”⁵¹¹

The decision whether to grant an extension appears to be a largely discretionary decision for the approving officer. But the act does provide that an “approving officer must not allow a declaration to be amended to extend the time for the election”:

- more than once, or
- for more than one year from the date stated in the declaration . . .⁵¹²

These two conditions may be overridden by a court order.⁵¹³

Electing not to proceed

The owner-developer may elect not to proceed with a phase. In these cases, the act provides both procedural and substantive safeguards for strata-lot owners in the earlier phases of the development.

The owner-developer must give written notice to both the strata corporation and the approving officer of its election not to proceed.⁵¹⁴ The owner-developer is also required to file notice of the election, “together with a reference plan” for the remainder parcel of land, with the registrar of land titles.⁵¹⁵

In addition to these procedural protections, the act also addresses some substantive issues that may arise from an election not to proceed. These substantive issues concern certain expenses and general unfairness to the strata corporation.

510. *Supra* note 1, s 231.

511. *Ibid*, s 232 (1).

512. *Ibid*, s 232 (2).

513. See *ibid*, s 232 (2), (3).

514. See *ibid*, s 235 (1) (a).

515. *Ibid*, s 235 (1) (b) (the reference plan must comply with section 100 (1) (a) of the *Land Title Act*, *supra* note 100).

If the phased strata property has “common facilities [that] have been constructed in the existing phases,”⁵¹⁶ then “the Supreme Court may order” the owner-developer to

- contribute to the expenses of the strata corporation that are attributable to the common facilities as if the owner developer had elected to proceed, and
- pay money, post a bond, provide a letter of credit or provide other security for the owner developer’s share of the expenses of the strata corporation under [the previous bullet point].⁵¹⁷

The strata corporation is also authorized to apply to court for a determination “whether the owner developer’s election not to proceed is unfair to the strata corporation.”⁵¹⁸ Although this section of the act has been cited in a number of court cases,⁵¹⁹ these cases have not established conclusively what amounts to “unfairness” in these circumstances.

If the court decides that the election is unfair then it “may make one or both of the following orders”:

- that the owner developer complete whatever common facilities the court considers equitable;
- that some or all of the security provided for the common facilities be paid as provided by the court.⁵²⁰

516. *Supra* note 1, s 235 (4) (a) (the court application may also be pursued if “the strata corporation has become contractually obligated to contribute toward the operating costs of common facilities on a separate parcel”). *Common facilities*, a defined term under the act, are discussed in more detail below at 158–61.

517. *Ibid*, s 235 (3) (the order may be made “on application of the owner developer or the strata corporation,” but the application must be made, in either case, “within 2 years of the receipt of notice” described earlier in the text).

518. *Ibid*, s 235 (5).

519. See *The Owners, Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, 2009 BCSC 1024, 97 BCLR (4th) 180; *Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, 2008 BCCA 509, 87 BCLR (4th) 21; *Owners v Lark Odyssey Project Ltd*, 2008 BCSC 316, (*sub nom Strata Plan LMS 1564 v Lark Odyssey Project Ltd*) 82 BCLR (4th) 178; *Kornfeld v Intrawest Corp*, 2005 BCSC 162, 29 RPR (4th) 61.

520. *Supra* note 1, s 235 (6).

Other amendments to the declaration

The act contains a procedure for other amendments to a Phased Strata Plan Declaration.⁵²¹ It is similar, in many respects, to the act's treatment of elections not to proceed.

The owner-developer doesn't have complete freedom to amend the declaration. Amendments are subject to a mix of procedural and substantive safeguards similar to those applicable to elections not to proceed.

The owner-developer must apply "to an approving officer for approval of the amendment."⁵²² If the proposed amendment reduces the unit entitlement of a subsequent phase and "common facilities have been constructed in the existing phases,"⁵²³ then "the approving officer may require the owner developer to contribute to the expenses of the strata corporation that are attributable to the common facilities as if the unit entitlement in the subsequent phase had not been reduced."⁵²⁴

The legislation also provides for two court applications. The first relates to the cost-sharing issue noted in the previous paragraph. It authorizes a strata corporation to apply to the supreme court for an "order that the owner developer pay money, post a bond, provide a letter of credit or provide other security for the owner developer's share of the expenses of the strata corporation."⁵²⁵

The other court application deals with unfairness. If the court decides "the amendment to the Phased Strata Plan Declaration significantly alters the common facilities to be built in a subsequent phase in a way that is unfair to the strata corporation,"⁵²⁶ then it may "make one or both of the following orders":

521. See *ibid*, s 233.

522. *Ibid*, s 233 (1).

523. *Ibid*, s 233 (3) (a). The approving officer may also order the owner-developer to contribute to expenses if "the strata corporation has become contractually obligated to contribute toward the operating costs of common facilities on a separate parcel" (*ibid*, s 233 (3) (b)).

524. *Ibid*, s 233 (2). The approving officer may not require a contribution if the strata corporation and the owner-developer enter into an agreement on this issue (see *ibid*, s 233 (2)). Such an agreement "must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, and for the purposes of that 3/4 vote, the owner developer is not an eligible voter" (*ibid*, s 233 (7)).

525. *Ibid*, s 233 (4).

526. *Ibid*, s 233 (5).

- that the owner developer complete whatever common facilities the court considers equitable;
- that some or all of the security provided for the common facilities be paid as provided by the court.⁵²⁷

Governance and phased strata plans

Introduction

Changing circumstances will clearly pose difficulties for any phased strata development. But legal issues will also arise even in cases in which the phased strata properly unfolds exactly as planned. These issues largely come about from the different interests of owner-developers and strata-lot owners. Managing those different interests while providing for the transition over control and governance from an owner-developer to strata-lot owners *and* dealing with the integration of phases subsequent to the first phase into the strata corporation calls for a highly sophisticated and detailed set of rules.

There are special challenges to strata governance that arise during the early life of any strata property. Upon deposit of a strata plan, the owner-developer becomes the registered owner of each of the strata lots in the development. This gives the owner-developer complete control over the strata corporation. Over time, this control slips away, as more and more strata lots are sold to individual owners.

But there will be a period during which the owner-developer is essentially able to dominate the strata corporation. There is an obvious tension here between the short-term interests of the owner-developer (primarily in marketing and selling off the remaining strata lots) and the longer-term interests of the incoming owners. The *Strata Property Act* pays heed to this tension, setting out a detailed and complex group of rules in part 3.

The governance challenges that part 3 addresses are only amplified when a strata property is developed in phases. As each new phase comes into being it must be integrated into the existing strata corporation. Special rules have been developed in the act and the regulation that attempt to adapt part 3 to this task.

Owner-developer's responsibilities

Part 3 of the act gives an owner-developer specific governance responsibilities at various points in the early life of a strata property. In the time before the strata cor-

527. *Ibid*, s 233 (6).

Consultation Paper on Complex Stratas

poration's first annual general meeting, the owner-developer "must exercise the powers and perform the duties of a [strata] council."⁵²⁸ The act requires the owner-developer—in exercising its powers and performing its duties—to

- act honestly and in good faith with a view to the best interests of the strata corporation, and
- exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.⁵²⁹

Specifically, it "must make reasonable efforts to pursue any remedies under warranties in existence with respect to the construction of the common property and common assets."⁵³⁰

After the first strata lot is conveyed, the owner-developer must, among other things, establish the strata corporation's contingency reserve fund⁵³¹ and prepare the strata corporation's interim budget.⁵³²

Later, the owner-developer "must hold the first annual general meeting during the 6 week period that begins on the earlier of"

- the date on which 50% plus one of the strata lots have been conveyed to purchasers, and
- the date that is 9 months after the date of the first conveyance of a strata lot to a purchaser.⁵³³

The owner-developer is required to "place" before this meeting a lengthy series of documents relating to the operation of the strata from the date of its creation to the date of the annual general meeting.⁵³⁴ The annual general meeting must also consid-

528. *Strata Property Act, ibid*, s 5 (1).

529. *Ibid*, s 6 (1).

530. *Ibid*, s 6 (2).

531. See *ibid*, s 12.

532. See *ibid*, s 13.

533. *Ibid*, s 16 (1).

534. *Ibid*, s 20 (2) ("At the first annual general meeting, the owner developer must (a) place before the meeting and give the strata corporation copies of all of the following: (i) all plans that were required to obtain a building permit and any amendments to the building permit plans that were filed with the issuer of the building permit; (ii) any document in the owner developer's possession that indicates the actual location of a pipe, wire, cable, chute, duct or other facility for the passage or provision of systems or services, if the owner developer has reason to believe that

er and approve the strata corporation's first annual budget.⁵³⁵ Within one week of the annual general meeting, the owner-developer must "transfer control of the strata corporation's money" and "deliver" keys and other means of access to strata buildings to the strata council.⁵³⁶

As would be expected, the owner-developer of a phased strata plan has to meet all these requirements with respect to the first phase.⁵³⁷ The interesting question is whether—and to what extent—the owner-developer will be bound by these requirements for subsequent phases. This question is answered in the *Strata Property Regulation*.

In giving its answer, the regulation distinguishes between a phased strata corporation that has not held its first annual general meeting by the time a new phase has been deposited in the land title office and a phased strata corporation that has held its first annual general meeting by this time.

In the former case, "the requirements of Part 3 of the Act" are made to apply generally "to the new phase as if it were the first phase of a phased strata plan"—subject to a detailed series of modifications that are meant to ensure that the provisions of the act are in sync with the phasing process.⁵³⁸

the pipe, wire, cable, chute, duct or other facility is not located as shown on a plan or plan amendment filed with the issuer of the building permit; (iii) all contracts entered into by or on behalf of the strata corporation; (iv) any disclosure statement required by the *Real Estate Development Marketing Act* or section 139 of this Act; (v) the registered strata plan as obtained from the land title office; (vi) names and addresses of all contractors, subcontractors and persons who supplied labour or materials to the project, as required by the regulations; (vii) all warranties, manuals, schematic drawings, operating instructions, service guides, manufacturers' documentation and other similar information respecting the construction, installation, operation, maintenance, repair and servicing of any common property or common assets, including any warranty information provided to the owner developer by a person referred to in paragraph (vi); (viii) all records required to be prepared or retained by the strata corporation under section 35; (ix) any other records required by the regulations, and (b) place an annual budget, prepared in accordance with section 21, before the meeting for approval.").

535. See *ibid*, s 21.

536. *Ibid*, s 22.

537. See *Strata Property Regulation*, *supra* note 2, s 13.4 (1).

538. *Ibid*, s 13.4 (3) ("If the first annual general meeting of the strata corporation established by the deposit of the first phase of a phased strata plan has not yet been held at the time that a new phase is deposited, the requirements of Part 3 of the Act apply to the new phase as if it were the first phase of a phased strata plan, but (a) in respect of the application of sections 7 to 14 and 16 of the Act, the reference to the first conveyance of a strata lot must be interpreted as a reference to the first conveyance of any strata lot in the strata plan, (b) in respect of the application of sec-

The latter case yields a still more complicated approach. In this case, the phased strata corporation has held its first annual general meeting by the time a subsequent phase has been deposited, but, upon deposit of a new phase, the act still requires the owner-developer to go through many of the steps generally required for a new strata corporation.⁵³⁹ In particular, an owner-developer is required (among other things) to contribute an amount to the strata corporation's contingency reserve fund in respect of the subsequent phase, prepare an interim budget, to turn over key documents, and provide access to financial records. But some of these requirements are subject to the timing of the strata corporation's budget. If the "strata corporation established by the deposit of the strata plan for the first phase of a phased strata plan has approved a budget at an annual general meeting before the deposit of a new phase," then somewhat different rules apply.⁵⁴⁰

Annual general meeting after deposit of subsequent phase

When each phase (except for the first phase) of a phased strata plan is deposited in the land title office, "the strata corporation must hold an annual general meeting during the 6 week period that begins on the earlier of":

- the date on which 50% plus one of the strata lots in the new phase have been conveyed to purchasers, and
- the date that is 6 months after the deposit of the new phase.⁵⁴¹

Commentators have noted, "technically speaking, the deposit of a new phase creates a new strata corporation, [but] that strata corporation is automatically amalgamated

tion 12 of the Act, the owner developer is not required to establish a separate contingency reserve fund for the new phase, but must pay the required amount into the contingency reserve fund of the strata corporation established by the deposit of the first phase of the phased strata plan, (c) in respect of the application of section 13 of the Act, the interim budget referred to in section 13 (1) (a) of the Act must be for the 12 month period following the deposit of the new phase rather than for the 12 month period following the first conveyance of a strata lot to a purchaser, (d) in respect of the application of section 14 of the Act, the period referred to in section 14 (1) must be interpreted as the period following the deposit of the new phase until the annual general meeting required under section 230 of the Act, and (e) in respect of the application of sections 20 (2) (a) and 22 (b) of the Act, the reference to the annual general meeting in those sections must be interpreted as a reference to the annual general meeting required under section 230 of the Act.").

539. *Ibid*, s 13.4 (4) ("sections 6 (2), 12, 13, 14, 18, 20 (2) (a) and (3), 22 (b) and 23 of the Act apply to the new phase as if it were the first phase of a phased strata plan").

540. *Ibid*, s 13.4 (5). See below at 155–57 for further discussion of budgets and finances.

541. *Strata Property Act*, *supra* note 1, s 230.

with the strata corporation previously created when the developer filed the first phase of the strata plan.”⁵⁴² This requirement to hold a general meeting of owners within the time frame set out in the act is part of the process to integrate new phases into the existing strata corporation.

Section 20 of the act—which contains a long list of documents that must be placed before the annual general meeting—gives a good indication of the content and agenda for this meeting.⁵⁴³ A special rule for electing new strata-council members at this annual general meeting must also be borne in mind.

At this annual general meeting “2 additional members of the council must be elected from the owners of strata lots in the new phase to hold office until the next annual general meeting of the strata corporation.”⁵⁴⁴ If electing these two additional council members would put the strata council over its maximum number of members, then the regulation steps in to allow the council to expand to the size needed to accommodate the new members until the strata corporation’s next annual general meeting.⁵⁴⁵

Budgets and finances in a phased strata plan

Integrating new phases into a strata corporation’s finances can be as difficult as integrating new phases into a strata corporation’s governance. As discussed above, the act requires an owner-developer to prepare first an interim budget (following the first conveyance of a strata lot) and a first annual budget (for approval at the strata’s first annual general meeting).⁵⁴⁶ The *Strata Property Regulation* adapts these requirements in complex ways for application to subsequent phases (after the first) in a phased strata plan.

The rules on budgets and contributions to the contingency reserve fund turn on the timing of the deposit of the new phase.

542. Mangan, *supra* note 9 at 502.

543. See *supra* note 534 for a list of the documents that the owner-developer must place before the annual general meeting.

544. *Strata Property Regulation*, *supra* note 2, s 13.5 (1).

545. See *ibid*, s 13.5 (3) (“Any limit on the size of council set out in the bylaws is deemed to be increased temporarily by one or 2 to accommodate the temporary addition of a member or members under this section.”).

546. See *supra* note 1, ss 13, 21.

If the new phase is deposited in the land title office before the strata corporation has held its first annual general meeting, then:

- “the owner developer is not required to establish a separate contingency reserve fund for the new phase, but must pay the required amount into the contingency reserve fund of the strata corporation established by the deposit of the first phase of the phased strata plan”;⁵⁴⁷ and
- “the interim budget referred to in section 13 (1) (a) of the Act must be for the 12 month period following the deposit of the new phase rather than for the 12 month period following the first conveyance of a strata lot to a purchaser.”⁵⁴⁸

If the new phase is deposited after the strata corporation has held its first annual general meeting but the strata corporation has not approved a budget, then:

- “the owner developer is not required to establish a separate contingency reserve fund for the new phase, but must pay the required amount into the contingency reserve fund of the strata corporation established by the deposit of the first phase of the phased strata plan”;⁵⁴⁹ and
- “the interim budget referred to in section 13 (1) (a) of the Act must be for the 12 month period following the deposit of the new phase rather than for the 12 month period following the first conveyance of a strata lot to a purchaser.”⁵⁵⁰

If the new phase is deposited after the strata corporation has held its first annual general meeting and the strata corporation has approved a budget, then:

- “the owner developer must calculate the contribution to the contingency reserve fund required under section 12 of the Act as a percentage of the estimated annual operating expenses as set out in the interim budget for the new phase of the strata plan only”;⁵⁵¹

547. *Strata Property Regulation*, *supra* note 2, s 13.4 (3) (b). The “required amount” is established by formulas set out in *Strata Property Act*, *supra* note 1, s 12, which vary based on the time of the first conveyance of a strata lot.

548. *Strata Property Regulation*, *supra* note 2, s 13.4 (3) (c).

549. *Ibid*, s 13.4 (4) (a).

550. *Ibid*, s 13.4 (b).

551. *Ibid*, s 13.4 (5) (b).

- “the interim budget referred to in section 13 (1) (a) of the Act must be based on the budget approved by the strata corporation”;⁵⁵² and
- “in addition to the copy of the interim budget required to be delivered under section 13 (1) (b) of the Act, the owner developer must deliver a copy of the most recent strata corporation budget to each prospective purchaser of a strata lot in the new phase before the prospective purchaser signs an agreement of purchase and sale.”⁵⁵³

Case law has established that the owner-developer must prepare the interim budget to apply to the whole strata corporation, even in cases in which a new phase is deposited after the strata corporation has approved its first annual budget.⁵⁵⁴ To deal with any disruption this may cause, “the *Act* attempts to respect the budget adopted at the annual general meeting by requiring that the new interim budget, which the owner developer must prepare, be based on the budget adopted at that annual general meeting.”⁵⁵⁵

In addition to these complex rules for phased-strata budgets, broader financial issues are also at play in the legislation. The final theme on the phased-strata legal framework looks at these issues.

Protecting the financial interests of owners in a phased strata plan

Introduction

The main policy goals of phasing legislation are financial in nature. Allowing a strata property to be developed in phases gives an owner-developer access to cash flows and financing that otherwise would not be available. It also gives an owner-developer enhanced flexibility to respond to changes in market conditions.

But these advantages for an owner-developer can run counter to the interests of strata-lot owners in a phased strata plan. If the owner-developer has the complete freedom to respond to changes in circumstances in any way it sees fit, then the re-

552. *Ibid*, s 13.4 (5) (a).

553. *Ibid*, s 13.4 (5) (c).

554. See *Owners, Strata Plan KAS 3485 v 0703008 B.C. Ltd*, 2011 BCSC 1655 at paras 16–20, [2011] BCJ No 2327 (QL) [0703008 B.C. Ltd], Barrow J. See also *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.27.

555. *0703008 B.C. Ltd*, *supra* note 554 at para 18.

sulting strata property may differ markedly from the development that owners thought they were buying into. This could have a significant financial impact on those owners.

So the act tries to strike a balance between preserving some flexibility for owner-developers and providing some protection to strata-lot owners' financial interests. The act's rules are not focussed evenly on all aspects of the phasing process. Instead, the focal point is major amenities—called *common facilities*—proposed or developed in connection with the phased strata. Heightened protection appears when a phased strata property has common facilities.

In addition to potential conflicts between an owner-developer and strata-lot owners, the perennial problem of allocating expenses fairly in a complex strata also arises in phased stratas and should be paid some heed.

Security for common facilities

One of the advantages of developing a strata property in phases is that it makes amenities more affordable. Buyers in early phases may make their decisions in part on the expectation that the strata property will ultimately contain the proposed amenities. The act takes special care to protect these expectations.

The act's term for amenities in a phased strata development is *common facilities*. This concept only appears in part 13 of the act, in connection with phased strata plans. The act defines the term in three steps:

- first, there is a generic description of a common facility as “a major facility in a phased strata plan”;
- then, for greater clarity, the definition goes on to list amenities that are common facilities, “including a laundry room, playground, swimming pool, recreation centre, clubhouse or tennis court”;
- and, finally, the definition closes with an important qualifier: “if the facility is available for the use of the owners.”⁵⁵⁶

Commentators have emphasized that this “definition is very broad, and may include things that are not necessarily common property.”⁵⁵⁷ There isn't much case law that has interpreted the act's definition of common facilities. One case that did give sus-

556. *Supra* note 1, s 217.

557. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.12.

tained consideration to it concluded that hot tubs in a ski lodge were common facilities, noting “[f]acilities like this are optional and are important or significant to the owners in enhancing the overall quality of the development.”⁵⁵⁸

One commentator has speculated that “a ‘common facility’ may now [under the *Strata Property Act*] include a major facility that is available for the use of only some of the owners (*e.g.*, a meeting room in one of the phases).”⁵⁵⁹ Another commentator has said that the definition’s wording has the effect of “exclud[ing] facilities that may be for the benefit, but not the use, of owners.”⁵⁶⁰

When “a common facility is to be constructed in conjunction with a phase of a strata plan,”⁵⁶¹ then the approving officer’s review must take account of two matters. The approving officer “must approve the phase” if the owner-developer meets one of the following conditions:

- the owner developer fulfills the requirements of section 223, or
- the common facility is at least 50% completed, as verified by the certificate of a registered architect or professional engineer.⁵⁶²

The reference to “section 223” in the first bullet point leads the reader to the act’s detailed requirements for posting security for the performance of an owner-developer’s declaration to construct common facilities. “If common facilities are to be constructed in a phase other than the first phase, or constructed on a separate parcel,” then the owner-developer must either

558. *The Owners, Strata Plan NES 97 v Timberline Developments Ltd*, 2010 BCSC 1811 at para 25, 100 RPR (4th) 114, Harris J, aff’d 2011 BCCA 421, 24 BCLR (5th) 234.

559. Scott D Smythe & EM (Lisa) Vogt, eds, *McCarthy Tétrault’s Annotated British Columbia Strata Property Act* (Toronto: Canada Law Book, 2014) (loose-leaf release no 18, June 2015) at SPA-243 (noting that “previous legislation defined a ‘common facility’ as being available for the use of ‘all’ owners”).

560. Fairweather, *supra* note 501 at 5.1.04 (“For example, if the owner developer constructs extra off-street parking stalls, and intends the strata corporation to rent them to non-owners, with the rental income accruing to owners, the parking stalls will not come under the definition of ‘common facility.’ As a result, the approving officer does not have the authority to require the owner developer to provide security for the construction of the parking stalls, even though the lure of the rental income may be materially significant to prospective purchasers.”).

561. *Strata Property Act*, *supra* note 1, s 225 (1).

562. *Ibid*, s 225 (2).

Consultation Paper on Complex Stratas

- [post] a bond, an irrevocable letter of credit or other security in an amount that, in the opinion of the approving officer, is sufficient to cover the full cost of constructing the common facility, including the cost of the land, or
- [make] other arrangements, satisfactory to the approving officer, to ensure the completion of the common facility.⁵⁶³

If the owner-developer takes neither of these steps, then the approving officer will not approve the Phased Strata Plan Declaration.⁵⁶⁴

If the owner-developer decides to post any of the financial instruments listed in the first bullet point as security, then that security is held by the local government of the municipality in which the strata is located.⁵⁶⁵

The act has detailed provisions on the release of security. They can be boiled down to requiring the release of security if

- the common facility is “substantially completed,”⁵⁶⁶
- the strata corporation’s elected strata council enters into an agreement with the owner-developer “for the completion of the common facilities and the release of the security is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting,”⁵⁶⁷ or
- the supreme court orders that the security be released.⁵⁶⁸

“[I]f a common facility is not substantially completed within the time for completion set out in the Phased Strata Plan Declaration,” then the strata corporation’s (or a

563. *Ibid*, s 223 (1).

564. See *ibid*, s 223 (1).

565. See *ibid*, s 223 (2) (“The bond, irrevocable letter of credit or other security required under subsection (1) (a) must be drawn in favour of, and must be held by, (a) the municipality in which the land is located, (b) the regional district in which the land is located if the land is not located in a municipality and is neither Nisga’a Lands nor treaty lands of a treaty first nation, (c) the Nisga’a Village if the land is located within Nisga’a Village Lands, (d) the Nisga’a Nation if the land is Nisga’a Lands other than Nisga’a Village Lands, or (e) the treaty first nation if the land is located within the treaty lands of that treaty first nation.”).

566. *Ibid*, s 226 (1) (a) (substantial completion must be “verified by the certificate of a registered architect or professional engineer”).

567. *Ibid*, s 226 (1) (b). The owner-developer “is not an eligible voter” for the purpose of this resolution (*ibid*, s 226 (2)).

568. See *ibid*, s 226 (1) (c), (d).

strata-lot owner's) remedy is to apply to court "for one or both of the following orders":

- that the owner developer complete whatever common facilities the court considers equitable;
- that some or all of the security provided for the common facilities be paid as provided by the court.⁵⁶⁹

A leading practice guide has noted that "[r]eported decisions dealing with an application for release of security are rare or non-existent. . . . [T]o succeed in an application for release of security without having built the common facility in the absence of consent by the strata corporation, an owner developer would have to establish a very good reason."⁵⁷⁰

The owner-developer's contribution to common expenses

An owner-developer is required to make a contribution to a phased strata corporation's common expenses "until all phases of a phased strata plan have been deposited."⁵⁷¹ This contribution only relates to "the expenses of the strata corporation that are attributable to the common facilities."⁵⁷² The extent of the contribution is determined by making the following calculation:⁵⁷³

$$\frac{\text{unit entitlement of strata lots in phases not deposited}}{\text{unit entitlement of strata lots in all phases whether deposited or not}} \times \text{expenses attributable to the common facilities}$$

The purpose of this provision is to strike a balance between the interests of "early purchasers in a phased development and the owner developer (who is, in effect, a proxy for future purchasers)" by attempting to ensure that the general formula for cost sharing in a strata corporation "does not unfairly burden the early purchasers with operating and maintenance costs of major facilities ultimately intended for all phases of the development."⁵⁷⁴

569. *Ibid*, s 226 (5).

570. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.19.

571. *Strata Property Act*, *supra* note 1, s 227 (1).

572. *Ibid*, s 227 (1).

573. *Ibid*, s 227 (2).

574. *Smythe & Vogt*, *supra* note 559 at SPA-251.

In this respect, the provision addresses another consequence that flows from the encouragement phasing lends to the development of amenities in a strata property. Effectively, it targets the flip side of the issue discussed in the preceding pages. The provisions regarding security for common facilities safeguard owners' expectations that amenities will be built in subsequent phases; the provisions on an owner-developer's contribution to common expenses protect the expectation that owners in subsequent phases will come to share the burden of paying for those amenities.

Cost sharing and phases

This consultation paper has had a consistent focus on how costs are shared and allocated in a complex strata. The discussion of both sections and types began by acknowledging that the "general rule under the SPA is that within a strata corporation 'you are all in it together.'"⁵⁷⁵ This general rule is made manifest in sections 99 and 108 of the *Strata Property Act*, which set out formulas for calculating strata fees and special levies. These formulas are based on a strata lot's unit entitlement (which will be determined in the vast majority of cases by the habitable area or total area occupied by the strata lot).

The discussion of sections and types highlighted cases in which the rigid application of the general rule on cost sharing could cause unfairness. So the act allows strata corporations to employ sections and types when a strata property features, for example, strata lots being put to significantly different uses or strata lots with significantly different architectural characteristics.

It's not hard to imagine how similar concerns around the application of the general rule could crop up in a strata property that was developed in phases. For example, if a building constructed in an early phase were to require extensive repairs, strata-lot owners in other buildings developed in later phases may question the fairness of a rule that makes them as responsible as the affected owners to contribute funds to pay for those repairs.⁵⁷⁶

But phased strata plans differ from sections and types in one key respect. As one commentator put it, "[p]hasing alone does not constitute an exception to the general rule" on cost sharing under the act.⁵⁷⁷

575. *Alvarez, supra* note 84 at para 35. See above at 22–28 for a general discussion of cost sharing.

576. See e.g. *Terry, supra* note 92.

577. *Mangan, supra* note 9 at 508.

So a phased strata corporation that wishes to share costs based on some formula other than the one provided for by the general rule will have to employ one of the tools that the act provides for varying the general rule. The creation of sections or types may be options in appropriate cases. But the word *appropriate* has to be highlighted here. Creating sections or types requires fulfilling certain conditions that are spelled out in detail in the legislation, regulation, and case law.⁵⁷⁸ The fact that a strata property was developed in phases doesn't automatically mean that these conditions will be met in a given case.

This means that strata properties that were developed in phases and that wish to alter the general rule for allocating expenses may, in many cases, have little choice but to rely on section 100 or section 108 (2) (b). These sections allow a strata corporation to alter the basis for calculating strata lots' contributions to strata fees (section 100) or a special levy (section 108 (2) (b)). The catch is that both sections require that new basis to be approved by a resolution passed by a unanimous vote. For a phased strata plan, which will almost by definition be a strata property with a large number of strata lots, this requirement may, in the ordinary course, prove to be a very difficult hurdle to clear.

And, in addition to the ordinary course, the *Strata Property Regulation* supplies a special rule that further restricts a strata corporation from changing the basis for sharing common expenses under section 100.⁵⁷⁹ This special rule only applies "if an owner developer is in compliance with the dates for the beginning of construction of each phase as set out in the Phased Strata Plan Declaration or amended Phased Strata Plan Declaration."⁵⁸⁰ If that is the case, then the strata corporation needs the owner-developer's "written consent" to pass a resolution under section 100 or it needs to wait until

- "the annual general meeting held following the deposit of the final phase" or

578. For sections, see *Strata Property Act*, *supra* note 1, s 191 (1) ("A strata corporation may have sections only for the purpose of representing the different interests of (a) owners of residential strata lots and owners of nonresidential strata lots, (b) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or (c) owners of different types of residential strata lots.") and *Strata Property Regulation*, *supra* note 2, s 11.1 ("For the purposes of section 191 (1) (c) of the Act, the following are the different types of residential strata lots: (a) apartment-style strata lots; (b) townhouse-style strata lots; (c) detached houses."). For types, see *Strata Property Regulation*, *ibid*, ss 6.4, 11.2 and *Smith*, *supra* note 407 at para 10 (" 'type' should be taken to denote the character or form of structure").

579. See *supra* note 2, s 13.3.

580. *Ibid*, s 13.3 (1).

- the owner-developer makes “an election not to proceed under section 235 or 236 (2) of the Act.”⁵⁸¹

Phases in other jurisdictions

British Columbia isn't the only jurisdiction to have legislation enabling and regulating phased strata plans. Such legislation is also found in other Canadian provinces and in Australia. The sections that follow briefly review the legislation in force in selected jurisdictions within these two countries. Their differing approaches to phasing sheds some light on the issues and options for reform facing British Columbia.

Canada

Most Canadian provinces allow phasing.

Alberta and Saskatchewan

Alberta⁵⁸² and Saskatchewan⁵⁸³ each allow and regulate phased strata-property developments with a combination of legislation and regulations.

Although rules in these two provinces differ in their details, they share several broad ideas with each other (and also with British Columbia's approach to phased strata plans). Like British Columbia, Alberta and Saskatchewan both require extensive disclosure of a plan of phased development on a prescribed form analogous to the Phased Strata Plan Declaration.⁵⁸⁴ Like British Columbia, Saskatchewan requires the proposal to create a phased strata plan to be reviewed and approved by a government official before it is deposited in the land title office.⁵⁸⁵ Alberta doesn't impose such a requirement.

581. *Ibid*, s 13.3 (1). A similar restriction applies to the amending of bylaws dealing with “(a) the keeping or securing of pets; (b) the restriction of rentals; (c) the age of occupants; (d) the marketing activities of the owner developer which relate to the sale of strata lots in the strata plan” (*ibid*, s 13.3 (2)).

582. See *Condominium Property Act*, RSA 2000, c C-22, s 19; *Condominium Property Regulation*, Alta Reg 168/2000, ss 32–45.

583. See *The Condominium Property Act, 1993*, *supra* note 198, ss 16–24; *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2, forms I, J, K, M, Q.

584. See *Condominium Property Regulation*, *supra* note 582, s 35 (phased development disclosure statement); *The Condominium Property Act, 1993*, *supra* note 198, ss 16 (developer's reservation), 17 (replacement plan).

585. See *The Condominium Property Act, 1993*, *supra* note 198, s 16 (3)–(5) (approval by minister of justice). This power may be delegated to a registrar or deputy registrar of land titles (see *ibid*,

Saskatchewan requires (similar to British Columbia) that an owner-developer post security for the completion of common facilities.⁵⁸⁶ Alberta lacks such a provision. Instead, its legislation relies on the courts to provide a remedy when the development does not proceed as planned.⁵⁸⁷

Manitoba and Ontario

Ontario has a detailed and complex legal framework for phasing.⁵⁸⁸ Recent amendments to Manitoba's legislation have brought its approach to phasing into line with Ontario's.⁵⁸⁹ Both provinces approach phasing in ways similar to British Columbia's system in many of their goals and substantive aspects, but they also differ from British Columbia's rules in a number of respects.

Unlike British Columbia—which allows an owner-developer to deposit a special type of strata plan (a phased strata plan) in the land title office at the start of the process—Ontario's and Manitoba's phasing process begins with the registration of a standard declaration and description for a condominium corporation.⁵⁹⁰ In order to create a phase, the declarant goes through a process of amending the declaration⁵⁹¹ and the description.⁵⁹²

s 22 (2)).

586. See *ibid*, ss 16 (4) (a) (“security as prescribed by the regulations that is for the purpose of providing a remedy to owners where the developer fails to complete the common facilities or the units as described in the declaration”), 16 (5) (a). See also *The Condominium Property Regulations, 2001*, *supra* note 583, ss 16–20.

587. See *Condominium Property Regulation*, *supra* note 582, s 36 (5)–(8).

588. See *Condominium Act, 1998*, SO 1998, c 19; *General Regulation*, O Reg 48/01.

589. See *The Condominium Act*, CCSM c C170, ss 13 (6), 229–46 [in force 5 November 2015]; *Condominium Regulation*, Man Reg 164/2014, s 47.

590. See Loeb, *supra* note 219, vol 2 (Toronto: Carswell, 1998) (loose-leaf release 2010–1) at 24§2 (“The requirements for creating a phased condominium corporation are divided into three parts: (a) The registration of a declaration and description for a freehold standard condominium corporation; (b) Amendments to the declaration required to create a phase; and (c) Amendments to the description required to create a phase.” [citations omitted]). Recent amendments will allow phasing for leasehold condominiums. See *Protecting Condominium Owners Act, 2015*, SO 2015, c 28, Schedule 1, s 126 (1) (repealing *Condominium Act, 1998*, *supra* note 588, s 145 (1) (a)) [not in force]. See also *The Condominium Act*, *supra* note 589, s 229.

591. See Ontario: *Condominium Act, 1998*, *supra* note 588, s 146 (4); *General Regulation*, *supra* note 588, ss 51–52; Manitoba: *The Condominium Act*, *supra* note 589, s 237.

592. See Ontario: *Condominium Act, 1998*, *supra* note 588, s 146 (5); *General Regulation*, *supra* note 588, ss 51, 53; Manitoba: *The Condominium Act*, *supra* note 589, s 237.

Ontario's process includes provisions on oversight and protection for purchasers and owners, which are similar to those found in British Columbia. An amendment to create a phase must be approved by an approval authority (the Ontario equivalent of British Columbia's approving officer).⁵⁹³ A declarant must post security for "facilities or services" that the municipality "determines are necessary to ensure the independent operation of the corporation if no subsequent phases are created."⁵⁹⁴ And new purchasers are entitled to enhanced disclosure, geared to the features of a phased condominium.⁵⁹⁵

Manitoba requires a declaration for a phased development to contain additional content.⁵⁹⁶ This additional content functions like the disclosure of information in a British Columbia Phased Strata Plan Declaration.

Ontario's and Manitoba's schemes also contain some features that are unlike any found in British Columbia. The main difference concerns the timing of phases and the involvement of the broader condominium corporation in phasing decisions.

Ontario only allows phases to be created when the condominium's "board has been elected at a meeting of owners held at a time when the declarant did not own a majority of the units."⁵⁹⁷ The declarant is required to disclose details about the amendment to the condominium corporation "at least 60 days" before registering the amendment.⁵⁹⁸ This 60-day period allows for the corporation to exercise a remedy that is unique to Ontario's phasing scheme. If the declarant's proposed amendments will result in changes to the number of units in the phase, the location of buildings in the phase, the facilities and services provided, or the proportion of ownership of the common elements that "are material and detrimentally affect the corporation or the use and enjoyment of the property by the owners," then the condominium corporation "may make an application to the Superior Court of Justice for an injunction to prevent the registration."⁵⁹⁹

593. See *Condominium Act, 1998*, *supra* note 588, ss 9, 146 (4) (e).

594. *Ibid*, s 146 (8), (9).

595. See *ibid*, s 147.

596. See *The Condominium Act*, *supra* note 589, s 13 (6).

597. *Condominium Act, 1998*, *supra* note 588, s 145 (1) (e).

598. *Ibid*, s 149 (1).

599. *Ibid*, s 149 (2).

Manitoba's approach to phasing also provides a big role for owners' consent to phases.⁶⁰⁰ The general rule is that phases require this consent to go ahead, unless the proposed phase is "implemented as described in the description"⁶⁰¹ or the owner-developer obtains court approval.⁶⁰² Going hand-in-hand with this general rule is a notice requirement, which calls for the owner-developer to spell out "the differences, if any, between the phase described in the amendment and the description of that phase in the declaration."⁶⁰³ Notice must be given to, among others, the condominium corporation and condominium owners.⁶⁰⁴ The notice requirement ties into a dedicated court procedure.⁶⁰⁵ Under this procedure, "an owner-developer or any person entitled to receive" information in the notice is entitled to apply to court for an order.⁶⁰⁶ The focus of the court application is on whether there is a "material difference between the phase described in the proposed amendment and the phase as described in the declaration."⁶⁰⁷

Atlantic provinces

New Brunswick,⁶⁰⁸ Nova Scotia,⁶⁰⁹ and Newfoundland and Labrador⁶¹⁰ each allow phasing. (Prince Edward Island has no legislation or regulations dealing with phases.) These three Atlantic provinces have schemes that are similar in broad outline to Ontario's—phasing is effected by amendments to the declaration and description—though with less detail and fewer protections for purchasers and owners.

600. See *The Condominium Act*, *supra* note 589, s 231 (1) ("a phasing amendment—and any plan amendment required for a phasing amendment—may be registered only if it is consented to in writing at a general meeting of unit owners at which the proposed phasing amendment is presented or within 180 days after that meeting").

601. *Ibid*, s 231 (2).

602. See *ibid*, s 231 (3).

603. *Ibid*, s 235 (1) (a) (ii).

604. *Ibid*, s 235 (1) (c).

605. *Ibid*, s 238.

606. *Ibid*, s 238 (1).

607. *Ibid*, s 238 (4).

608. *Condominium Property Act*, SNB 2009, c C-16.05, ss 12, 44.1–44.2; *General Regulation*, NB Reg 2009-169, ss 7–10.

609. *Condominium Act*, RSNS 1989, c 85, ss 8, 12AA; *Condominium Regulations*, NS Reg 60/71, ss 75–76.

610. *Condominium Act, 2009*, SNL 2009, c C-29.1, ss 74–77.

New Brunswick's act incorporates the oversight regime for land subdivision into its rules on phases.⁶¹¹ Further, if "the development proposed in an amendment differs significantly from the development proposed in the declaration approved by the Director," then it may only go ahead if the declarant obtains the consent of unit owners.⁶¹²

Nova Scotia exempts phases from "subdivision-approval requirements," so long as the phased development meets the requirements listed in the regulation.⁶¹³ But Nova Scotia does require that "the property reserved for future phases" be "bound by a covenant" to ensure that future phases correspond with the declaration and description.⁶¹⁴

Both Nova Scotia and Newfoundland and Labrador have extensive disclosure requirements associated with phases.⁶¹⁵

Territories and Québec

None of Yukon, the Northwest Territories,⁶¹⁶ or Nunavut has legislation authorizing phased condominium development. Québec's legislation also doesn't appear to authorize phased developments.

Australia

Although the terminology varies from jurisdiction to jurisdiction, nearly all of Australia's states and territories have legislation enabling what in British Columbia

611. *Condominium Property Act*, *supra* note 608, s 12 (1) ("[t]he registration of a phased-development condominium property constitutes a subdivision of land").

612. See *ibid*, s 44.1 (2). The threshold for consent is "the owners of at least 60% of the common elements, or a greater percentage if specified in the declaration" (*ibid*, s 43 (1)).

613. *Condominium Act*, *supra* note 609, s 8 (1). See also *Condominium Regulations*, *supra* note 609, ss 75A, 76.

614. *Condominium Act*, *supra* note 609, s 12AA (1) (a).

615. See *Condominium Regulations*, *supra* note 609, s 75 (2); *Condominium Act, 2009*, *supra* note 610, s 75.

616. In 2007, the Northwest Territories amended its legislation to add an enabling provision for phased condominium developments, but this amendment hasn't been brought into force. See *An Act to amend the Condominium Act*, SNWT 2007, c 6, s 6 (adding s 6.1 to the *Condominium Act*, RSNWT 1988, c C-15).

would be called the phased development of a strata property.⁶¹⁷ South Australia appears to be the only outlier, lacking this kind of legislation.⁶¹⁸

In terms of its level of detail, Australia's legislation runs the gamut. Some jurisdictions' strata-property legislation does little more than enable phasing, which is then regulated under land-use and planning rules.⁶¹⁹ But other jurisdictions have detailed legislative frameworks for phasing, similar to what is found in British Columbia's *Strata Property Act*.⁶²⁰ The pages that follow focus on legislation in these jurisdictions—the Australian Capital Territory, New South Wales, and Tasmania—highlighting provisions that might be of interest for reform proposals in British Columbia.

The Australian Capital Territory, New South Wales, and Tasmania all require advance disclosure of a plan to create a phased strata development in a document that is analogous to British Columbia's Phased Strata Plan Declaration.⁶²¹ The three Australian jurisdictions all require approval by a planning official for the phased development to proceed.⁶²²

617. See Australian Capital Territory: *Unit Titles Act 2001* (ACT), ss 7 (1) (a), 17 (4), 17 (6)–(7), 20 (2)–(3), 22, 23 (1) (a), 24, 27 (1) (b), 29, 30 (staged development); New South Wales: *Strata Schemes (Freehold Development) Act 1973* (NSW), ss 28A–28QH (staged development), *Strata Schemes (Leasehold Development) Act 1986* (NSW), ss 41–57AH (parallel provisions for leasehold stratas); Northern Territory: *Unit Title Schemes Act* (NT), ss 64–67 (progressive development); Queensland: *Body Corporate and Community Management Act 1997* (Qld), ss 28–29 (progressive subdivision); Tasmania: *Strata Titles Act 1998* (Tas), ss 34–50A (staged development schemes); Victoria: *Subdivision Act 1988* (Vic), s 37 (staged subdivision); Western Australia: *Strata Titles Act 1985* (WA), schedule 2A, item 8 (staged development). See also Western Australia, Landgate, *Strata Titles Reform Consultation Paper* (October 2014) at 51–54 (proposed reforms to Western Australia provisions).

618. See *Strata Titles Act 1988* (SA); *Strata Titles Regulations 2003* (SA).

619. See *Unit Title Schemes Act* (NT); *Body Corporate and Community Management Act 1997* (Qld); *Subdivision Act 1988* (Vic); *Strata Titles Act 1985* (WA).

620. See *Unit Titles Act 2001* (ACT); *Strata Schemes (Freehold Development) Act 1973* (NSW); *Strata Schemes (Leasehold Development) Act 1986* (NSW); *Strata Titles Act 1998* (Tas).

621. See *Unit Titles Act 2001* (ACT), s 7 (1) (a) (development statement); *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28A (4) (strata development contract); *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 41 (4) (strata development contract); *Strata Titles Act 1998* (Tas), s 34 (master plan and disclosure statement).

622. See *Unit Titles Act 2001* (ACT), s 20 (3) (approval under *Planning and Development Act 2007* (ACT)); *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28B (consent authorities); *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 42 (consent authorities); *Strata Titles Act 1998* (Tas), s 36 (developer must obtain approval from “council for the area in which the site is situated”).

Like the *Strata Property Act*, the Australian Capital Territory's legislation deals with posting security.⁶²³ Security isn't mandatory in all cases under the ACT provision; it "may" be required by the planning and land authority.⁶²⁴ If the developer is required to post security, then it is used to secure "the completion of the development in accordance with the development statement."⁶²⁵ The legislation caps the amount of security that may be required.⁶²⁶

New South Wales and Tasmania take a different approach to attempting to secure the developer's performance of its obligations under the phasing plan. New South Wales's act draws a distinction between two types of terms found in a strata development contract: *warranted development*, which is "any proposed development that the developer for the development lot concerned warrants will be carried out and may be compelled to carry out," and *authorised proposals*, which are "any other proposed development that the developer will be authorised but cannot be compelled to carry out."⁶²⁷ The New South Wales act characterizes the strata development contract as "an agreement under seal" between the developer, strata-lot owners, and any "registered or enrolled mortgagee, chargee, covenant chargee or lessee, or an occupier, of a lot."⁶²⁸ This imports contractual remedies into the enforcement of a phased strata development.⁶²⁹

Tasmania's act takes a similar approach. If anything, its legislation goes even further than New South Wales's. The Tasmania act provides that the "developer under a staged development scheme warrants to any person who enters into a contract to purchase a lot or a proposed lot in the scheme that the development will be carried

623. See *Unit Titles Act 2001* (ACT), s 24.

624. *Unit Titles Act 2001* (ACT), s 24 (2).

625. *Unit Titles Act 2001* (ACT), s 24 (2) (a).

626. See *Unit Titles Act 2001* (ACT), s 24 (3) ("The required security must not exceed—(a) for a staged development—10% of the total cost of the work required to be carried out to complete the staged development; or (b) in any other case—the amount required to complete the incomplete works under the notice.").

627. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28A (4). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 41 (4).

628. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28I (1). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), 49 (1).

629. See *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28I (8). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 49 (8).

out in accordance with the scheme.”⁶³⁰ It further allows an “interested person” to apply to court for “a mandatory injunction requiring the developer under a staged development scheme to complete the scheme in accordance with the terms of the scheme.”⁶³¹

The three Australian jurisdictions also involve strata-lot owners more in decisions to change aspects of the phasing plan than is seen in British Columbia. Like British Columbia, amendments to the relevant phasing document require approval from each jurisdiction’s approving authority. In the Australian Capital Territory, this approval may only be granted if the developer has obtained the written consent of persons with an interest in the affected land.⁶³² Tasmania similarly requires that an application to vary a registered staged development scheme be accompanied by “the written consents of all present and prospective owners of lots in the scheme.”⁶³³

New South Wales has a more complex set of rules on when an amendment requires approval from strata-lot owners. The rules are geared to the nature of the amendment being proposed:

630. *Strata Titles Act 1998* (Tas), s 46.

631. *Strata Titles Act 1998* (Tas), s 45. An “interested person” is “(a) an owner or prospective owner of a lot; (b) a body corporate for a strata scheme within the staged development scheme; (c) the council for the relevant area.”

632. See *Unit Titles Act 2001* (ACT), ss 29 (2) (a) (before registration of unit-title application with staged development requiring “written agreement to the amendment of each person with an interest in the parcel”), 30 (2) (a) (after registration of units plan subject to a staged development requiring “written agreement to the amendment of each person with an interest in a unit in that part of the parcel comprising the uncompleted stages of the development”). In both cases, the planning and land authority may allow the amendment if the developer “could not reasonably be aware of [the] interest” or “made reasonable efforts to obtain the agreement” or if the person with the interest “would not suffer any substantial long-term detriment because of the proposed amendment” or if “it is desirable to authorise the amendment having regard to the overall interests of everyone with interests” in the parcel or the uncompleted stages of the development (see *Unit Titles Act 2001* (ACT), ss 29 (3), 30 (3)).

633. *Strata Titles Act 1998* (Tas), s 42 (4) (a). The legislation also provides that “[t]he council may dispense with the consent of a present or prospective owner if—(a) the council is satisfied that the owner would not be adversely affected by the variation; or (b) the council is satisfied that the whereabouts of the owner or prospective owner is unknown to, and not reasonably ascertainable by, the applicant; or (c) if less than 25% of the present and prospective owners have refused or failed to consent, the council is satisfied that consent has been unreasonably withheld” (see *Strata Titles Act 1998* (Tas), s 42 (5)).

Consultation Paper on Complex Stratas

- for “a change in the basic architectural or landscaping design of the development, or in its essence or theme,”⁶³⁴ the amendment must be “supported by a unanimous resolution of the body corporate of the strata scheme concerned”;⁶³⁵
- for an amendment to “give effect to a change in the law or a change in the requirements of a consent authority (but that does not involve a change in the basic architectural or landscaping design of the development, or in its essence or theme),”⁶³⁶ only notice is required;⁶³⁷
- for “[a]ny other proposed amendment that would require a change in the terms of a development consent,”⁶³⁸ the amendment must be “supported by a special resolution of the body corporate of the strata scheme concerned”;⁶³⁹
- for “[a]ny other proposed amendment that would not require a change in the terms of a development consent,”⁶⁴⁰ the amendment must be “supported by an ordinary resolution of the body corporate of the strata scheme concerned.”⁶⁴¹

Finally, New South Wales’s legislation contains a unique provision requiring a “strata development contract must predict a time, being no later than the tenth anniversary

634. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (2). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (2).

635. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (2) (b). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (2) (b).

636. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (3). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (3).

637. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (3) (b) (requiring notice to “the body corporate of the strata scheme concerned, and the proprietor of each lot in that scheme (other than the developer), and each registered or enrolled mortgagee, chargee, covenant chargee and lessee of a lot in that scheme”). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (3) (b).

638. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (4). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (4).

639. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (4) (b). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (4) (b).

640. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (5). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (5).

641. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28] (5) (a). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50 (5) (a).

sary of the day on which the contract was registered, as the time for conclusion of the development scheme to which it relates.”⁶⁴²

ISSUES FOR REFORM

Introduction

Legislation on phased strata plans needs to be “both legally detailed and structurally flexible.”⁶⁴³ It must address both the interests of owner-developers in being able to manoeuvre through changing circumstances in the development of a phased strata plan and those of strata-lot owners in being able to rely on a relatively certain plan of development.

The issues for reform that follow are marked by the tension between these different interests. They are organized to track the discussion of phases under the *Strata Property Act*. Like that discussion, the issues are divided into four main categories:

- applying to deposit a phased strata plan;
- changing circumstances;
- governance and phased strata plans;
- protecting the financial interests of owners in a phased strata plan.

But the discussion of issues begins with a general consideration of the need for rules on phasing.

ISSUES FOR REFORM—GENERAL

Should the Strata Property Act continue to enable the development of strata properties in phases?

Brief description of the issue

There are benefits to having legislation enabling the phased development of strata properties, such as increasing the diversity of developers who can enter the strata-property market and fostering enhanced amenities for strata-lot owners. But there

642. *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28Q (2). See also *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 57 (2).

643. Tod P Groman, “Phasing Condominiums” (1974) 48:4 *St John’s L Rev* 872 at 873.

are also downsides that come with phasing, such as administrative complexity and the potential for an owner-developer's interests to trump the interests of strata-lot owners. This issue poses the fundamental question of whether the legislation should continue to enable phased strata plans—effectively asking readers whether the benefits of phases continue to outweigh their disadvantages.

Discussion of options for reform

There are essentially only two options to consider for this issue: having the legislation continue to support phases or repealing the provisions enabling phases from the act.

Legislation on phases has two goals. It encourages a greater diversity of real-estate developers to take on and complete sophisticated, large-scale strata developments. And it provides safeguards for potential purchasers and strata-lot owners in phased strata properties.

There are several advantages to developing a strata property in phases. The owner-developer is able to tap into revenue from and financing secured against strata lots in earlier phases to fund development of later phases of the project. The owner-developer is given the flexibility to tailor later phases in the strata property to respond to changes in the real-estate market. The larger scale of the resulting strata property also enhances its ability to support amenities for the benefit of its residents.

But there are also drawbacks to phased strata properties. The legislation required to implement the system for enabling and regulating phased strata properties is invariably going to be highly complex. These complicated provisions make it more difficult to grasp legislation governing strata properties in general. They can also contribute to the difficulty that many purchasers and owners have in understanding the details of a phased strata development. A strata property that is developed in phases will also force owner-developers and strata-lot owners to remain in a legal relationship over a longer period of time than would be the case in a typical strata property. This lengthened relationship can make budgeting and governance more difficult in a phased strata than in a traditional strata.

As was noted earlier in this chapter,⁶⁴⁴ most Canadian jurisdictions do have legislation on phases. But a handful do not. It may be possible, even in the absence of phas-

644. See above at 166–71.

ing legislation, to develop a strata property in phases using easements, cost-sharing agreements, and, perhaps, the act's provisions on amalgamating strata corporations.

The committee's tentative recommendation for reform

The committee strongly favours retaining phasing in the *Strata Property Act*. Phasing allows for greater diversity of strata-property developers and developments. It allows strata properties to acquire amenities that otherwise would be beyond their reach. Phasing may also provide a public benefit in ensuring a more orderly development of large parcels of land than would be the case under other development techniques. The absence of phasing legislation could result in a reduction of such development or in the creation of such developments using private arrangements, which may lack the protections for purchasers and owners found in the *Strata Property Act*.

The committee tentatively recommends:

44. The Strata Property Act should continue to enable the development of strata properties in phases.

ISSUES FOR REFORM—APPLYING TO DEPOSIT A PHASED STRATA PLAN

Should the Strata Property Act continue to require an owner-developer to prepare and file a Phased Strata Plan Declaration?

Brief description of the issue

This issue addresses the first of two special features that the *Strata Property Act* applies to the deposit of a phased strata plan: enhanced disclosure of information in a prescribed form. Enhanced disclosure may help to fulfill the legislation's consumer-protection and public-interest goals. But it could also be seen as an administrative burden on an owner-developer. Should this requirement remain in the act?

Discussion of options for reform

The committee focussed its attention on the legislative enabling provision itself, considering two options: to retain it or to repeal it.

Enhanced disclosure—in the form of a Phased Strata Plan Declaration—has been a feature of British Columbia's legislation on phased stratas since that legislation's enactment in the 1970s. Enhanced disclosure gives public administrators and potential

strata-lot purchasers a detailed picture of the proposed development. It is intended to provide these groups with the information they need to make informed decisions, respectively, in the public interest and in their own interests.

It still may be possible to question the value of this enhanced-disclosure requirement. It does serve to undercut one of the goals of the legislation, which is encouraging a larger pool of developers to take on and carry out large-scale, sophisticated strata developments. Disclosure requirements take away from some of the flexibility afforded under other provisions of the act, making phased developments less attractive to developers. The Phased Strata Plan Declaration also duplicates, to some degree, disclosure required under other legislation, such as the *Real Estate Development Marketing Act*.⁶⁴⁵

Enhanced disclosure could also be criticized as not providing effective safeguards for purchasers. The theory supporting enhanced disclosure is that it gives purchasers the information they need to make informed choices in the marketplace and to protect their own interests. Yet there is anecdotal evidence that purchasers still fail to appreciate the risks and challenges of buying into a phased strata. More substantive safeguards could be better suited to protect their interests.

The committee's tentative recommendation for reform

The committee is of the view that the requirement to file a Phased Strata Plan Declaration is integral to the process of developing a phased strata plan. The requirement appears to be fulfilling its consumer-protection and public-interest goals while not causing undue administrative burdens.

The committee tentatively recommends:

45. The Strata Property Act should continue to require an owner-developer to file a Phased Strata Plan Declaration as a condition to depositing a phased strata plan.

Should the Strata Property Act continue to require an owner-developer to obtain the approval of an approving officer to a phased strata plan?

Brief description of the issue

This issue is closely connected with the preceding issue. It is directed at the second oversight mechanism that comes into operation when an owner-developer wants to

645. *Supra* note 158.

deposit a phased strata plan: approval by a public official. Although this type of oversight is common in legislation governing phased strata plans, it is not a feature of all phasing statutes. Should it continue to be a feature of British Columbia's phasing legislation?

Discussion of options for reform

The committee considered two options for addressing this issue: retaining the legislative requirement for approving-officer approval or repealing it.

The advantages of requiring approving-officer approval of a Phased Strata Plan Declaration tie into the broader aims of phasing legislation. A goal of phasing legislation is to encourage the development of large-scale, sophisticated strata properties. Requiring approving officers to approve these complex developments is a means to ensure that they are properly planned and carried out. The requirement ultimately ensures that the public interest is represented in the development process for phased strata plans. It also provides a platform for some ongoing oversight, as the legislation often requires that significant changes (mainly those involving common facilities) be approved by an approving officer.

Public oversight in this fashion is a component of most—but not all—legislation on phases. British Columbia could move in the direction of those jurisdictions that do not rely on it. There may be advantages to this approach. It could streamline the process of developing a phased strata property. And it could provide greater flexibility to the legal framework. But it would be difficult to make this reform in isolation. The act relies, to a significant degree, on the approving officer's discretion to protect the public interest. In its absence, it would likely be necessary to spell out legislative criteria to fulfill this goal. Or it would be necessary to reassign the approving officer's role to some other public official.

The committee's tentative recommendation for reform

The committee favours retaining the requirement that approving officers review and approve Phased Strata Plan Declarations. In the committee's view, approving officers play an important role in ensuring that phased strata plans are developed in the public interest. There is no obvious replacement for the role they play in approving the declaration.

The committee tentatively recommends:

46. The Strata Property Act should continue to require an owner-developer to obtain the approval of an approving officer to a phased strata plan.

Should approval of a Phased Strata Plan Declaration expire after one year?

Brief description of the issue

An approving officer's approval of a Phased Strata Plan Declaration is subject to a time limit. That approval "expires" after one year, "unless the first phase is deposited before that time."⁶⁴⁶ In the view of one commentator, this expiry creates an "absolute" deadline.⁶⁴⁷ If the first phase isn't deposited in the land title office before this deadline passes, then the approval effectively becomes a nullity. The act does not make any provision for the approving officer to extend this deadline. So an owner-developer who failed to deposit the first phase within this time and who still wanted to press on with the phased strata plan would, in all likelihood, have no option other than to start over at the beginning. The owner-developer would have to start a new application to an approving officer for approval of a Phased Strata Plan Declaration. Should an approving officer's approval continue to expire after one year, or should it remain in force for a longer period or indefinitely?

Discussion of options for reform

The committee considered four options to address this issue. One option would be simply to retain the current provision. A second would be to retain the current approach, but with a longer period before expiry. The third option considered was to retain the current time limit, but to give an approving officer the discretion to extend it. Finally, the committee considered simply repealing this time limit altogether.

Starting with the current rule, the committee attempted to assess it by examining whether it is fulfilling its legislative purpose. The goals of the current rule are unclear. Unlike much of the act's legal framework on phasing, which can be traced back, largely unchanged, to the first appearance of phasing provisions in the mid-1970s, this requirement only dates to the advent of the *Strata Property Act*.⁶⁴⁸ There is no public record of why this change appeared in the *Strata Property Act*. There is also no public commentary on the purposes of this provision.

646. *Strata Property Act*, *supra* note 1, s 222 (2).

647. Fairweather, *supra* note 501 at 5.1.08.

648. This concept was found in the 1994 ministry draft version of the act, with somewhat different wording: "The declaration may be approved at any time during the year before the deposit of the first phase of the strata plan." See British Columbia, Ministry of Finance and Corporate Relations, *Condominium Act: Discussion Draft* (Victoria: Ministry of Finance and Corporate Relations, 1994) at s 189 (2).

It is possible to speculate on the goals of the provision. It may be intended to limit the possibility that changing facts and circumstances might cast a shadow over the approval of the Phased Strata Plan Declaration. The risks of this occurring increase as time passes from the date of approval. The one-year expiry date also provides a measure of closure and certainty to the process. In some cases, it may be clear that a project isn't going to progress to deposit of the phased strata plan. This provision ensures that such projects don't continue to carry the approving officer's seal of approval.

It's also possible to speculate on the drawbacks of this rule. Placing an expiry date on the approval of Phased Strata Plan Declaration does limit the flexibility afforded to owner-developers. The one-year limit might not be realistic in some cases. The choice of one year as the time limit could also be characterized as arbitrary. There is no obvious connection between this period and the time required to move from approval of a Phased Strata Plan Declaration and depositing the first phase of the strata plan.

There are a number of ways to approach reforming this rule. One way would be to change the time limit. Providing that the approval only expired, for example, after two or three years would address concerns about flexibility without any of the practical difficulties in moving from declaration to deposit of the phased strata plan. But it would retain the arbitrary nature of the rule.

One way to address concerns about arbitrariness would be to keep the current time limit and give the approving officer the discretion to grant extensions. This approach would effectively allow for appropriate time limits to be crafted on a case-by-case basis. If there were a good reason for an owner-developer being unable to deposit the phased strata plan within one year, then the approving officer would grant an extension. Inadvertent or sloppy developers would not be rewarded with additional time. The drawback to this approach is that it would inject further complexity into the system, and would require additional resources to administer (by the approving officer) and navigate (by many owner-developers).

The final option to consider is simply to do away with this concept of an expiring approval altogether. This approach would return the legislation to its position before the enactment of the *Strata Property Act*. It would take arbitrariness out of the rule. But it would also remove the elements of closure and certainty that an expiry date brings to the system.

The committee's tentative recommendation for reform

The committee favoured the second option for reform. The committee understands that the current rule has caused problems for real-estate developers. Although there are methods to reduce these concerns, they amount to workarounds. It would be better to address the source of developers' concerns in the legislation.

While there is always some arbitrariness to any time limit, in the committee's view two years would be preferable to the current one. A two-year limit would give real-estate developers more time to deposit the first phase of a phased strata plan, allaying their concerns. The two-year period would be equivalent to the two-year basic limitation period.⁶⁴⁹ This approach would also retain the goals of certainty and finality, which are aspects of the current system, and would avoid the complexity inherent in building a discretionary element into the rules.

The committee tentatively recommends:

47. The Strata Property Act should provide that an approving officer's approval of a Phased Strata Plan Declaration expires after two years unless the first phase is deposited before that time.

Should the application of section 510 of the Local Government Act to a phased strata plan be clarified?

Brief description of the issue

Depositing a phase in the land title office is considered to be a subdivision of land.⁶⁵⁰ On the face of it, this appears to trigger the requirement for provision of park land or payment for parks purposes found in the *Local Government Act*.⁶⁵¹ There is apparently some confusion over the scope of this provision and some inconsistencies in its application. Should the *Strata Property Act* be amended to address these concerns?

Discussion of options for reform

The committee considered several options to address this issue.

649. See *Limitation Act*, SBC 2012, c 13, s 6.

650. See *Strata Property Act*, *supra* note 1, s 228 (1) (a).

651. See *Local Government Act*, RSBC 2015, c 1, s 510 (1) ("an owner of land being subdivided must, at the owner's option, (a) provide, without compensation, park land of an amount and in a location acceptable to the local government, or (b) pay to the municipality or regional district an amount that equals the market value of the land that may be required for park land purposes under this section as determined under subsection (6) of this section").

One option would be simply to provide that section 510 doesn't apply to the deposit of a phase. This approach would have the benefit of clarity and certainty. It would also simplify the process of developing a phased strata property somewhat. A potential disadvantage to amending the *Strata Property Act* is that it could frustrate the purpose of section 510 of the *Local Government Act* to encourage the creation of park land.

Another approach would be to develop criteria for the application of section 510 to the deposit of a phase. Such criteria would address the concerns about uncertainty and inconsistency. But this approach may have downsides, too. It would make the *Strata Property Act* and the phasing process more detailed and complex. And it wouldn't be consistent with the general thrust of the act's provisions involving the approving officer, which largely leaves decisions to the approving officer's discretion and avoids setting out binding guidelines or criteria.

The committee's tentative recommendation for reform

The committee is sympathetic to the concerns that section 510 may be causing problems in practice. In its view, those problems should be addressed by amending the *Strata Property Act* to make it clear that section 510 doesn't apply to the deposit of a phase. This approach is clear, certain, and consistent with the act's overall treatment of approving-officer decisions. It is unlikely to significantly undermine the purpose of section 510.

The committee tentatively recommends:

48. Section 228 of the Strata Property Act should be amended to provide that despite section 510 of the Local Government Act the deposit of a phase of a phased strata plan does not require provision of park land or payment for parks purposes.

ISSUES FOR REFORM—CHANGING CIRCUMSTANCES

Should the Strata Property Act allow an interested person to apply for an injunction to complete a phased strata in accordance with a Phased Strata Plan Declaration?

Brief description of the issue

One of the major concerns for an owner in a phased strata is that the phased development will unfold in accordance with the Phased Strata Plan Declaration. The *Strata Property Act* provides a relatively high level of protection for owners, ranging

from requiring security for the construction of a common facility to procedural safeguards around elections not to proceed with a phase or decisions to amend the declaration.

But the act's provisions don't cover all instances in which a phased strata property's plan of development may go off the rails. One stream of British Columbia cases involving a phased strata plan demonstrated some of the limits of the legislation.⁶⁵² This complex proceeding—which involved a number of misrepresentation and construction issues that are not germane to phasing—had at its centre a strata property that was to be developed in phases. The development was delayed and, ultimately, the owner-developer elected not to proceed but to develop the property as “an independent complex.”⁶⁵³ The plaintiffs sought to advance a constructive trust over these “phase two” lands as a remedy for their misrepresentation and construction-defect claims. Although this argument was ultimately unsuccessful,⁶⁵⁴ the case does stand as an illustration of how a phased strata property can change significantly over the course of its development.

Other jurisdictions have stronger legislative provisions binding a developer to its plan of development. Should British Columbia follow their lead?

Discussion of options for reform

The committee considered a provision in force in Australia as a potential model for reform in British Columbia.

Tasmania's act provides an example of a legislative remedy for cases in which such changes go against the wishes of strata-lot owners. Its legislation permits an “interested person” to apply to court for “a mandatory injunction requiring the developer under a staged development scheme to complete the scheme in accordance with the terms of the scheme.”⁶⁵⁵ An “interested person” is defined in the act as:

- an owner or prospective owner of a lot;
- a body corporate for a strata scheme within the staged development scheme;

652. See *The Owners, Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, *supra* note 519; *Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, *supra* note 519; *Owners v Lark Odyssey Project Ltd*, *supra* note 519.

653. *Owners v Lark Odyssey Project Ltd*, *supra* note 519 at para 11, Preston J.

654. See *Strata Plan LMS 1564 v Odyssey Tower Properties Ltd*, *supra* note 519 at para 22.

655. *Strata Titles Act 1998* (Tas), s 45 (1).

- the council for the relevant area.⁶⁵⁶

This section hasn't been considered by the Tasmanian courts. But its advantages are relatively clear. It would give an interested person an opportunity to make a case for keeping a phased strata on its original path of development if it appears to have departed from that path. This remedy would help protect the expectations of strata-lot owners who purchased their strata-lots on the strength of the plan of development set out in a Phased Strata Plan Declaration. It might also give the public more confidence in phased strata properties by providing another safeguard that they will unfold as planned.

The downsides of such a provision would primarily affect the owner-developer of a phased strata property. The owner-developer would lose some flexibility in the development of a phased strata property. Litigation could increase. While the issuance of an injunction would not be automatic, owner-developers would have to expend time and resources to defend even relatively clear cases. This could lead owner-developers to shun the legislation in favour of creating the equivalent of phased stratas by a complex web of easements and cost-sharing agreements.⁶⁵⁷ Such a development could be to the disadvantage of owners and purchasers, who may be left with less protection under a contractual framework than they currently have under the *Strata Property Act*.

The committee's tentative recommendation for reform

The committee gave this proposal extensive consideration, deciding in the end not to endorse it. The committee had concerns about how this legislation would operate if an owner-developer were insolvent. It also noted that in many instances when a phased development goes off the rails the strata-lot owners want nothing more than to extricate themselves from the developer and the plan of development. That said, the committee did recognize that many strata corporations do want to be able to exercise some control when a phased development doesn't unfold as planned. Although, in its view, this point should not extend so far as to call for legislation provid-

656. *Strata Titles Act 1998* (Tas), s 45 (1). A "body corporate" is the equivalent of a British Columbia strata corporation; the "council" is the equivalent of an approving officer under the *Strata Property Act*.

657. See Loeb, *supra* note 219 at 24§2 ("The phased condominium corporation concept is in the author's opinion not one that many developers of large projects will be willing to use. There are significant disclosure obligations imposed on the developer by the *Condominium Act, 1998* and the existing corporation(s) has the right to apply to court for an injunction of the registration of a subsequent phase. Although the easement and cost-sharing agreements currently used in Ontario are complex, the risks of developing a phased condominium corporation may outweigh the potential benefits of phasing.").

ing for injunctive relief, the committee didn't think its position would have the effect of precluding a court in a given case from granting an injunction under the court's equitable jurisdiction.

The committee tentatively recommends:

49. The Strata Property Act should not be amended to allow a strata-lot owner or prospective strata-lot owner, a strata corporation, or an approving officer to apply to the supreme court for a mandatory injunction requiring the owner-developer under a phased strata plan to complete the phased strata in accordance with the Phased Strata Plan Declaration.

Should the Strata Property Act require an owner-developer to obtain the consent of the affected strata corporation to any amendments to the Phased Strata Plan Declaration?

Brief description of the issue

This issue looks at another way to address the concerns raised in the preceding issue. Instead of examining the use of a court-based remedy invoked by a single owner (or other interested person), this issue probes whether the legislation can give strata-lot owners collectively a greater say in how a phased strata plan may unfold in the face of changing circumstances.

Currently, the *Strata Property Act* doesn't directly involve strata-lot owners in decisions to change course in the development of a phased strata property.⁶⁵⁸ Instead, an owner-developer is permitted to elect not to proceed with the development, extend the time in which to make this election, or make other amendments to a Phased Strata Plan Declaration generally with the approval of the approving officer. Should the act be amended to require owners' consent to amendments to the Phased Strata Plan Declaration?

Discussion of options for reform

This issue presented two options for the committee to consider: amend the act to require owners' consent to amendments to the Phased Strata Plan Declaration or leave the status quo in place.

There are several advantages to amending the act. Giving a greater role for owners will help to ensure that their interests are considered and protected when changing

658. See above at 147–51.

circumstances call for a change to the Phased Strata Plan Declaration. Owners may feel powerless when such changes occur. The main benefit of amending the act is that it would directly address this problem. As a subsidiary benefit, amending the act may promote broader public confidence in phased strata plans. People may feel greater assurance that phased strata properties will either develop as planned or will only change in a way that takes the views of owners into account.

There may also be downsides to requiring owners' consent. This requirement could make the phasing process more cumbersome and difficult. It could add time, costs, and administrative burdens for an owner-developer, making it marginally less attractive to develop a strata property in phases. And amending the act will have the effect of making it somewhat longer and more complex.

The committee's tentative recommendations for reform

The committee decided that the potential benefits of proposing this change outweigh its possible costs.

The committee tentatively recommends:

50. The Strata Property Act should require an owner-developer to obtain the consent of the affected strata corporation to an election to extend the time to proceed, an election not to proceed, or other amendments to a Phased Strata Plan Declaration.

The committee gave some thought to whether the consent requirement should be modified in some way. New South Wales's legislation, for example, sets out a detailed list of changes that each requires specific levels of owner approval.⁶⁵⁹ The committee decided that it favoured a simpler approach. It considered qualifying the general provision, using language such as *material*. But this approach was considered vague and potentially ineffectual. In the end, the committee decided to require that owners must act reasonably in giving or refusing consent. This standard is well-known in real-estate law and practice, and it should help to ensure that strata-lot owners do not exercise their power in frivolous or arbitrary ways.

The committee tentatively recommends:

51. The Strata Property Act should require that a strata corporation's consent to an amendment to a Phased Strata Plan Declaration should not be unreasonably withheld.

⁶⁵⁹ See *Strata Schemes (Freehold Development) Act 1973* (NSW), s 28]; *Strata Schemes (Leasehold Development) Act 1986* (NSW), s 50.

Finally, the committee considered how its proposals should be implemented. In the committee's view, owners' consent to a change should be evidenced by a strata-corporation resolution passed by a 3/4 vote. A certificate of the strata corporation, certifying this resolution, should then be filed in the land title office. Both requirements will promote clarity and certainty.

Implementation of the second requirement will call for a consequential amendment to the existing form of certificate of strata corporation.⁶⁶⁰

The committee tentatively recommends:

52. The Strata Property Act should require that a strata corporation's consent to an amendment to a Phased Strata Plan Declaration should be required to be expressed by (a) a resolution of the strata corporation passed by a 3/4 vote and (b) the filing in the land title office of a Certificate of Strata Corporation in the prescribed form stating that the resolution referred to in paragraph (a) has been passed.

Should the Strata Property Act allow a strata corporation to apply to the supreme court for a declaration that the owner-developer be deemed to have elected not to proceed even if no order that the owner-developer complete the phase by a set date has been made?

Brief description of the issue

This issue on changing circumstances addresses the opposing side of the issues preceding it. Those issues considered cases in which tension develops between an owner-developer who wishes to depart from the phasing plan and strata-lot owners who want to see that plan remain on track. This issue is concerned with cases in which the strata-lot owners in earlier phases want to extricate themselves from a phasing plan that has ground to a halt.

To take a simple example, a planned five-phase strata property may stall at three phases. The owner-developer may be insolvent, with no realistic prospect of restarting the phasing process. Yet the owners in the first three phases remain coupled to the unbuilt phases on the remainder parcel. Should the act be amended to address this situation, and, if so, how should it be amended?

660. See *Strata Property Regulation*, *supra* note 2, Form E.

Discussion of options for reform

There is potentially a host of options that could address this issue. The committee focussed on two.

The first option consisted of an enhanced remedy that would allow strata-lot owners to sever the existing phases from the remainder parcel. This option would directly address the heart of owners' concerns, by giving them the means effectively to divorce themselves from the planned, but unbuilt, subsequent phases. But there are concerns about how such a remedy could be implemented. The precise time frame and triggers for such a remedy may be difficult to articulate in legislation.

The second option involved an extension of an existing provision in the *Strata Property Act*. Section 236 applies when an owner-developer has delayed in proceeding with a phasing plan.⁶⁶¹ The section contains two provisions. One authorizes the strata corporation to apply to the supreme court for an "order that the owner developer complete a phase by a set date." The second deals with an owner-developer's failure to comply with that order. It provides that "the court may declare that the owner developer be deemed to have elected not to proceed."

The second part of section 236 is more germane to this issue. It would give strata-lot owners a practical way to address their concerns if they could proceed directly to this stage, and not have to pass through what in these cases will be a doomed attempt to have an owner-developer complete the outstanding phases. This may be the simplest way to deal with this issue for reform.⁶⁶²

A potential downside to this approach is that it could be characterized as a roundabout way to provide owners with a remedy, one which doesn't directly address the issue at hand.

661. See *supra* note 1, s 236 ("(1) On application by the strata corporation, the Supreme Court may order that the owner developer complete a phase by a set date if (a) the owner developer has elected to proceed, or is deemed to have elected to proceed under section 231, and (b) the court is satisfied that the owner developer has not proceeded with the phase (i) within a reasonable time after the date stated in the Phased Strata Plan Declaration or an amended declaration, or (ii) at a reasonable speed. (2) If the owner developer does not comply with the court order under subsection (1), the court may declare that the owner developer be deemed to have elected not to proceed.").

662. See *ibid*, s 235 (spelling out implication of an owner-developer electing not to proceed with a phase).

The committee's tentative recommendation for reform

The committee favours amending section 236 of the act. Such an amendment would effectively deal with the vast majority of owners' concerns in these circumstances. This approach would also be the simplest to implement and administer.

The committee tentatively recommends:

53. Section 236 of the Strata Property Act should be amended to allow a strata corporation to apply to the supreme court for a declaration that the owner-developer be deemed to have elected not to proceed even if no order that the owner-developer complete the phase by a set date has been made.

Should section 232 of the Strata Property Act continue to require approval by an approving officer of an amendment to the declaration to extend time for an election to proceed?

Brief description of the issue

If an owner-developer wishes to extend the time in which to make an election to proceed with a new phase, section 232 of the act holds that the owner-developer "must apply to an approving officer for an amendment extending the time in which to make the election."⁶⁶³ Critics contend that this requirement is out of step with the functions of the approving officer and that it doesn't add a significant layer of protection for strata-lot owners or the general public. Should the act continue to require an approving officer to approve an extension of the time to make an election to proceed?

Discussion of options for reform

The committee considered the current rule and a series of options to revise it.

Section 232 is one of a number of provisions on phased strata plans that call for an owner-developer to obtain the approval of an approving officer before carrying out a proposed action. This requirement appears to be intended to build in an oversight role for approving officers, giving them some scope to protect the interests of existing strata-lot owners and the general public. In this specific case, an extension of time in which to elect whether to proceed with a new phase may be felt as a change in the development's composition by existing owners or the public.

663. *Ibid*, s 232 (1).

The current provision's disadvantages relate to the question whether approving officers are adequately equipped to play this oversight role. The decision isn't clearly connected to the land-use and planning functions normally carried out by approving officers. Further, these requests often crop up in cases in which the development has begun to go off track and the relationship between the owner-developer and strata-lot owners has begun to erode. In these conditions, extraneous disputes and issues may serve to complicate the approving officer's decision-making process.

One option for reform would be to call on another public official to play the oversight role that the section creates. This approach would retain the general thrust of the section. The downside is that there is no clear candidate to replace the approving officer in this role. The superintendent of real estate or the land title office, to take two examples, would be similarly constrained in their mandates and resources.

Another option would be to remove this requirement. This would result in a somewhat simpler and more streamlined phasing process. But it could also be seen as leaving strata-lot owners and the public with less protection.

The committee's tentative recommendation for reform

The committee considered a number of refinements to section 232 that might give approving officers some assistance in carrying out the role currently assigned to them by the section. It also examined a number of alternative decision makers who might be able to fulfill this role. In the end, the committee decided that both approaches would likely not address the heart of the problem.

This left the option to remove the requirement for approving-officer approval. The committee decided that this approach would be acceptable, so long as the existing restrictions in subsection (2) remain in place. As a result, an owner-developer would be able to extend the time for electing to proceed with a new phase one time for up to one year. A further extension or a longer period would require an order from the supreme court.

The committee noted that it's possible for an owner-developer's security for common facilities to lapse during an extension. It determined that the parties would have to plan for this possibility and build in adequate safeguards.

The committee tentatively recommends:

54. Section 232 of the Strata Property Act should be amended to provide that (a) an owner-developer may amend a Phased Strata Plan Declaration to extend the time for making an election to proceed with the next phase without applying to an approving

officer for approval of the amendment and (b) an owner-developer must not amend a Phased Strata Plan Declaration to extend the time for making an election to proceed (i) more than once or (ii) for more than one year from the date stated in the declaration, except in accordance with an order of the supreme court.

ISSUES FOR REFORM—GOVERNANCE AND PHASED STRATA PLANS

Should the Strata Property Act enable a regulation that expressly sets out the owner-developer’s governance obligations upon the deposit of a phase?

Brief description of the issue

The main challenge for governance of a phased strata corporation is how to integrate phases after the first phase into the existing strata corporation. The *Strata Property Act* has an intricate set of requirements that must be met at specific times over the initial existence of any strata corporation. The overriding questions for phases are (1) whether, and (2) to what extent, this detailed scheme should apply to the first phase and, later, to what may be referred to as a new or subsequent phase—that is, to a phase that is deposited in the land title office after the first phase.

The transition from owner-developer to strata-lot-owner control of the strata corporation is particularly fraught. Part 3 of the *Strata Property Act* contains a lengthy and detailed set of obligations placed on the owner-developer during this period. Section 13.4 of the *Strata Property Regulation* governs how these obligations apply to first and subsequent phases in a phased strata plan. Section 13.4 essentially contains lists of provisions from part 3 of the act, which it proceeds to apply, modify, or disapply (as the case may be) for phases at various stages in their development.

Section 13.4’s approach to setting out the governing law may be described as incorporation by reference. The applicable law is found in part 3 of the act, as adopted or modified by section 13.4 of the regulation. So readers who want to learn what the law is must look back and forth between these two sources. Should the regulations continue this approach, or should they instead expressly spell out the applicable rules for new and subsequent phases?

Discussion of options for reform

Although it would be possible to devise a large number of ways to combine both approaches, the committee narrowed its options for this issue down to two clear choices: either adopt a new, freestanding regulation that expressly sets out an owner-developer's governance obligations for first and subsequent phases or maintain the status quo, which incorporates those obligations by reference.

Creating a freestanding regulation would have many advantages. First and foremost, a complex area of the law would be made clearer and more accessible. This could lead to fewer disputes between owner-developers and incoming owners. It would bolster confidence in the phasing process.

There may be some downsides to spelling out the owner-developer's governance obligations in a freestanding regulation. The resulting regulation would be lengthy and complex. It might not provide a significant gain in transparency or accessibility for readers who don't have legal training.

The current approach may benefit from allowing for a more compact and brief statute and regulation. It avoids the need to set out a vast number of detailed provisions, many of which may have to be substantially repeated to ensure coverage of all important points in a phased strata corporation's development. The current approach may also benefit from familiarity.

But there are some significant drawbacks to relying on incorporation by reference as the means for setting an owner-developer's governance obligations for phased strata plans. It is a more opaque approach to setting out the law, one which could result in confusion and could fuel disputes between the owner-developer and strata-lot owners.

The committee's tentative recommendation for reform

The committee favours spelling out the owner-developer's governance obligations in a freestanding regulation. This approach should help to clarify the law. It will also support other reforms that the committee proposes for this area of the law.

The committee tentatively recommends:

55. A new, freestanding regulation should be adopted that expressly sets out the owner-developer's obligations from part 3 of the Strata Property Act upon deposit of a phase other than the first phase of a phased strata plan, which are currently incorporated by reference in section 13.4 of the Strata Property Regulation.

Should the Strata Property Act continue to require a strata corporation to hold an annual general meeting after the deposit of each phase in a phased strata plan other than the first phase?

Brief description of the issue

The act's basic rules on annual general meetings apply to the strata corporation created by the deposit of the first phase in a phased strata plan. But the act also calls for holding annual general meetings, within a defined timetable, for each new phase.⁶⁶⁴ Since more than one new phase could be deposited within the same year, this requirement has been criticized as causing duplication and confusion. Should the act rechristen the general meeting that needs to be held after the deposit of a new phase? Should it alter some of the demands made in connection with holding that meeting? Or should it do away with the requirement to hold a general meeting at all?

Discussion of options for reform

The committee considered several options for reform, ranging from simply changing the name of the general meeting to fundamentally reworking the requirements upon deposit of a new phase to doing away with those requirements altogether. Its starting place was an examination of the rationales for the current rule, along with its advantages and disadvantages.

The holding of an annual general meeting is a milestone in any strata corporation's governance. The election of a strata council and the adoption of an annual budget take place at the annual general meeting.⁶⁶⁵ There are special obligations on an owner-developer that tie into the first annual general meeting, such as the turnover of major documents and the transfer of physical and financial control from the owner-developer to the strata council,⁶⁶⁶ and special requirements that relate to the budget presented to the first annual general meeting.⁶⁶⁷

664. See *ibid*, s 230 ("Subject to the regulations, if a phase other than the first phase of a phased strata plan is deposited, the strata corporation must hold an annual general meeting during the 6 week period that begins on the earlier of (a) the date on which 50% plus one of the strata lots in the new phase have been conveyed to purchasers, and (b) the date that is 6 months after the deposit of the new phase.").

665. See *ibid*, ss 25, 103.

666. See *ibid*, ss 20 (2), 22.

667. See *ibid*, s 21.

Calling for an annual general meeting after the deposit of new phases can be seen as an efficient way to integrate those phases into the regulatory structure applicable to strata corporations generally. It's of a piece with the broader approach to phased-strata governance found in the act and the *Strata Property Regulation*, which relies heavily on incorporation by reference.

But this approach has been criticized in commentary on the act and the regulation.

Commentators' criticisms appear to be aimed at two related but distinct targets. First, commentators have criticized the legislative drafting of the relevant provisions of the act and the regulation, specifically their reliance on the expression *annual general meeting*.⁶⁶⁸ This expression can lead to confusion in cases in which it appears to require a strata corporation to hold two or more "annual" meetings in one year.

Second, commentators have also questioned some of the substantive requirements imposed by this choice of words. The target here appears to be the policy that deposit of a new phase should be treated as the functional equivalent of deposit of a non-phased strata plan (with a few exceptions allowed by regulation). This approach has been characterized as "complex"⁶⁶⁹ and burdensome.⁶⁷⁰

One commentator has illustrated these points with a detailed example,⁶⁷¹ which featured the following events happening at the following dates:

- 15 January 2015: strata corporation for a phased strata plan with only one phase deposited in the land title office holds its annual general meeting;
- 30 January 2015: second phase deposited in the land title office;
- 30 March 2015: third phase deposited in the land title office;
- 30 July 2015: strata corporation holds second annual general meeting;⁶⁷²

668. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.26 (characterizing act and regulation as being "hampered by confusing terminology" and calling use of expression a "misnomer"); Mangan, *supra* note 9 at 505 (wondering why the act "characterizes the meeting as an AGM instead of a special general meeting").

669. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.26.

670. See Mangan, *supra* note 9 at 505 (concluding that act "will cause some strata corporations to hold multiple AGMs in the same year with consequent inconvenience and confusion").

671. See Mangan, *ibid* at 506–07.

672. See *Strata Property Act*, *supra* note 1, s 230 (requiring annual general meeting "during the 6

Consultation Paper on Complex Stratas

- 30 September 2015: strata corporation holds third annual general meeting.

According to this commentator, this scenario illustrates the general “confusion,” “inconvenience,” and “expense” of the reliance on annual general meetings as part of the means of integrating new phases into an existing strata corporation. Fleshing out the point, the commentator referred to the following specific difficulties that may occur in such a scenario:

- the strata corporation must incur the time and expense needed to prepare and distribute a budget multiple times;⁶⁷³
- there may be confusion about the numbers and terms of strata-council members to be elected;⁶⁷⁴
- strata corporations may fail to ratify rules at the appropriate annual general meeting, leading to confusion about their status (as ceasing to have effect).⁶⁷⁵

A simple way to address the drafting issue would be to change the word *annual* in the legislation to *special*. Since it’s always possible to hold multiple special general meetings in one year, this change would address the logical confusion that is caused by having the act appear to call for more than one annual general meeting in one year.

week period that begins on the earlier of (a) the date on which 50% plus one of the strata lots in the new phase have been conveyed to purchasers, and (b) the date that is 6 months after the deposit of the new phase”).

673. See Mangan, *supra* note 9 at 506.

674. See *ibid* at 506–07 (“In the ordinary course of events, section 25 of the Act says that at *each* AGM the eligible voters *must* elect a council. . . . By contrast, section 13.5 (1) of the regulations says that at an AGM under section 230 of the Act, ‘two additional members of the council must be elected from the owners of strata lots in the new phase to hold office until the next AGM of the strata corporation.’ If section 25 of the Act prevails, the eligible voters must elect a whole new council at each AGM, including an AGM under section 230 of the Act. If section 13.5 (1) of the regulations governs, the voters will only elect ‘two additional members of the council.’ ” [emphasis in original]), 507 (“[T]he regulations fail to provide for a situation where there are multiple AGMs in a year under section 230 of the *Strata Property Act*. Section 13.5 (1) of the regulations says that the two additional council members elected at an AGM under section 230 of the Act will, ‘hold office until the next AGM of the strata corporation.’ . . . [I]f two new council members are elected at the 30 July AGM in the example in the text [w]hat happens to those two council members on September 30, being the next AGM of the strata corporation? Do the two council members from Phase Two lose their council seats, while two additional council members are elected from among the owners in Phase Three?”).

675. See *ibid* at 507–08. See also *Strata Property Act*, *supra* note 1, s 125 (6).

But this drafting change would also sever the link between the first general meeting held after the deposit of a subsequent phase and the act's general requirements for a strata corporation's first annual general meeting. This could be the intended consequence of this change. In addition to clarifying the language of the provision, it would also address two of the three areas of confusion noted above. Since the meeting is a special general meeting, there would be no requirements to approve a budget or elect a new strata council.⁶⁷⁶

The content of such a special general meeting would appear to be completely under the control of the affected strata corporation. There may be advantages to this approach. It may give phased stratas the flexibility to deal with just the issues that affect them, without getting bogged down in irrelevant general requirements.

But there would also likely be drawbacks to this proposed change. It could result in swapping the confusion caused by trying to apply the overly specific framework for annual general meetings to the meeting held after deposit of a subsequent phase for the confusion that will likely be caused by trying to apply the open-ended framework for special general meetings to the meeting held after deposit of a subsequent phase. It's possible that strata corporations could simply put off dealing with financial and governance issues until the next strata-corporation annual general meeting, robbing this special meeting of most of its purpose. This might result in ongoing confusion and tensions within the strata corporation.

Another way to approach this issue would be to make the drafting change—swapping *annual* for *special*—and then make additional amendments designed to give specific instructions about what a strata corporation would need to address in this special general meeting. Under this approach, it would be necessary to go through all the matters that must be addressed at an annual general meeting and decide whether they should be addressed in this type of special general meeting.

This approach might be the clearest way to proceed. It would address the logical confusion caused by holding multiple “annual” meetings in one year. It would also present the opportunity to expressly set out the issues that must be addressed at this general meeting, rather than relying on a form of incorporation by reference.

676. The requirement to ratify rules would remain, since it applies to both annual and special general meetings. But the rules would remain in effect until the next annual general meeting. See *Strata Property Act, ibid*, s 125 (6) (“A rule ceases to have effect at the first annual general meeting held after it is made, unless the rule is ratified by a resolution passed by a majority vote (a) at that annual general meeting, or (b) at a special general meeting held before that annual general meeting.”).

There may be downsides to this option, which would vary with the approach to it the committee decides to take. A modest approach would likely result in something similar to the status quo, which has been criticized as complex and burdensome. A more ambitious approach runs the risk of resulting in an even-more complex legal framework.

Finally, another option would be to repeal the requirement to hold a general meeting after deposit of a new phase. This approach would have the advantages of clarity and simplicity. The confusion generated by having to hold multiple “annual” general meetings in one year would disappear. This option would also lessen the administrative burden on the strata corporation, which would be allowed to plan for the integration of the new phase on the strata-corporation’s existing general-meeting timetable.

The downside of this option is that it would delay integration of the new phase into the strata corporation. The act provides that a new phase is instantaneously amalgamated with the existing strata corporation upon its deposit in the land title office.⁶⁷⁷ Doing away with the requirement to hold an annual general meeting shortly after depositing the new phase means that the ultimate integration of that phase into the strata corporation will take place on a longer timetable. Important governance and financial issues might only be addressed in as many as 11 months after deposit of the phase. This could allow problems to develop and fester.

The committee’s tentative recommendation for reform

The committee gave this issue extensive discussion. It considered various name changes, as well as potentially rolling back some of the substantive requirements that crop up when a new phase is deposited in the land title office.

In the end, the committee favoured the clarity and simplicity of repealing the requirement to hold a general meeting shortly after deposit of a new phase.

The committee understands that it isn’t uncommon to see multiple new phases deposited in a single year. As the commentary on this issue shows, when this occurs it imposes significant levels of confusion and administrative burdens on the strata corporation and its agents and advisors. These problems could be addressed by renaming the general meeting and by tweaking some of its requirements. But this approach would only provide a partial solution. The greater gains in simplifying the administration of a phased strata plan, in the committee’s view, outweigh any disad-

⁶⁷⁷. See *ibid*, s 228 (1) (b).

vantages in lengthening the timetable for integrating the new phase into the existing strata corporation.

The committee addresses the major implications of this decision in its following tentative recommendations on phase-strata-corporation governance and finances.

The committee tentatively recommends:

56. Section 230 of the Strata Property Act, which requires a strata corporation to hold an annual general meeting during the six-week period that begins on the earlier of the date on which 50% plus one of the strata lots in the new phase have been conveyed to purchasers and the date that is six months after the deposit of the new phase, should be repealed. Consequential amendments should be made to sections 13.2 to 13.6 of the Strata Property Regulation.

Should the Strata Property Regulation require the election of two additional council members from the owners of a new phase at the general meeting that must be held after the deposit of a subsequent phase in the land title office?

Brief description of the issue

This issue is connected to the previous issue. One of the main reasons for requiring an annual general meeting after the deposit of a new phase is to deal with the question of strata-council representation for new phase owners. Section 13.5 of the regulation contains the relevant rule, which provides that “2 additional members of the [strata] council must be elected from the owners of strata lots in the new phase to hold office until the next annual general meeting of the strata corporation.”⁶⁷⁸

This rule is open for question in light of the committee’s tentative recommendation to repeal the requirement for an annual general meeting after the deposit of a new phase. On a broader note, critics of this requirement say that it can be burdensome in some cases. Should the regulation continue to impose this special rule?

Discussion of options for reform

The committee considered a range of options, running from repealing to revising to retaining the current rule.

678. *Supra* note 2, s 13.5 (1).

The current rule appears to be designed to guarantee strata-lot owners in a new phase a voice in the governance of the strata corporation. In this way, they can ensure that their concerns are raised and given a hearing at the council level. As a result, integration of the new phase may be smoother and critical issues, such as those related to warranties, may remain within clear sight of the council.

The main disadvantage of the current rule is that it is a mandatory, one-size-fits-all solution that might be inappropriate or burdensome for some strata corporations. Large phased developments, for example, could see many new phases deposited in a single year. Adding two council members for each new phase in these cases can swell the council's size to unworkable proportions. In other cases, apathy among new owners could be a problem. Compliance with the rule could result in conscripting uninterested owners on to the council.

One way to address these concerns would be to reformulate the provision as a permissive (rather than mandatory) rule. Such a rule would enable those strata corporations that want to add additional strata-council members from the new phase to do so.⁶⁷⁹ But it would also be flexible enough to allow strata corporations to avoid making these appointments when circumstances demand a different approach.

The potential downsides of this reform flow from its main strength—its flexibility. It would likely be successful in very clear cases, in which everyone can agree on whether or not additional council members should be appointed. But the rule could breed conflict if the owners in the new phase had views that differed from the owners in existing phases. Rules could be put in place to govern those situations, but it would make the provision much more complicated. On the other hand, simply changing the *must* that appears in the current provision to a *may* could drain all the force from the provision, if it were only applied when it was in the interest of existing owners to do so.

If the provision were to be nothing more than a paper tiger, then it could be argued that the law would be better off if it were repealed. This option was the last one that the committee considered for this issue. Its main advantage is its simplicity. Repealing the provision will address concerns about administrative burdens in the current rules, without adding any new rules that could turn out to be burdensome themselves.

679. The current rule contains a provision that allows for the appointment of new strata-council members even if the strata corporation has reached the maximum number of members under its bylaws. See *ibid*, s 13.5 (3).

The downside of repealing the regulation is that it could leave the interests of owners in the new phase with less protection than is the case under the current rules. These owners wouldn't be completely shut out, as there are other avenues to make their concerns known. They also would be eligible to run for a strata-council position at the strata corporation's next annual general meeting. But they would lack the guaranteed representation in the critical early period of integrating the new phase that the regulations currently provide.

The committee's tentative recommendation for reform

The committee found this issue to pose a number of difficult problems. It was sympathetic to complaints about the mandatory approach, which can impose governance requirements and administrative burdens on some strata corporations. It looked for an approach that would allow the regulations to address these concerns, while still maintaining protection for the interests of new-phase owners.

In the end, the committee found that striking this balance would result in a highly detailed and complex provision. The legal framework for phased strata plans is already highly detailed and complex in its own right. The committee was loath to add to these qualities. This led the committee to consider the simplicity of repealing the regulation. This approach would be clear, and it would remove some of the administrative complexity of developing a phased strata plan. There are other means in the act that could serve to protect the interests of owners in a new phase.⁶⁸⁰

Finally, this approach would be in harmony with the committee's tentative recommendation to repeal the requirement to hold an annual general meeting after deposit of a new phase.

The committee tentatively recommends:

57. Section 13.5 of the Strata Property Regulation, which requires the election of two additional council members from the owners of a new phase at the phase annual general meeting that must be held after the deposit of a subsequent phase in the land title office, should be repealed.

680. See e.g. *Strata Property Act*, *supra* note 1, s 43 (special general meeting called by voters).

Should an owner-developer be required to turn over to the strata corporation the records listed in section 20 (2) (a) of the Strata Property Act for a new phase by no later than a set period following the deposit of that phase in the land title office?

Brief description of the issue

This issue arises as another consequence of the committee's proposal to repeal the requirement to hold an annual general meeting after the deposit of a new phase. Under the current rules,⁶⁸¹ the turnover of critical operational records⁶⁸² from the owner-developer to the strata corporation is to occur at this annual general meeting. If the requirement to hold this annual general meeting is repealed, then when should this turnover occur?

Discussion of options for reform

There are potentially a limitless number of options that could be pursued in connection with this issue. The committee narrowed its choices down to two. Either the turnover could occur at the next strata-corporation annual general meeting after the deposit of the new phase or it could occur on a date set by the regulation.

Both options would ensure that important records about the new phase make their way from the owner-developer to the strata corporation. Requiring the turnover at an annual general meeting would be consistent with the approach found elsewhere in the *Strata Property Act*. But the downside of this option is that it would require straining that approach to fit the realities of a phased strata corporation. The first annual general meeting of a strata corporation is a highly choreographed affair, which accommodates the turnover of records well. Different issues are at play in later annual general meetings. A turnover of records may stick out on the agenda of such a meeting.

The other option is to make the turnover of records a freestanding requirement, which must be accomplished by a set date. This approach would ensure that the turnover occurs promptly after deposit of the new phase. Its only real drawback is that it wouldn't be in harmony with the general approach for strata corporations.

681. See *Strata Property Regulation*, *supra* note 2, ss 13.4 (3) (e), 13.4 (4) (d).

682. See *Strata Property Act*, *supra* note 1, s 20 (2) (a).

The committee's tentative recommendation for reform

The committee favoured the second option. Requiring turnover of records by a set date creates certainty. While any date chosen for the turnover would be somewhat arbitrary, the committee was of the view that 90 days after the deposit of a new phase would be an appropriate deadline.

The committee tentatively recommends:

58. The Strata Property Regulation should require an owner-developer to turn over to the strata corporation the records listed in section 20 (2) (a) of the Strata Property Act for a phase other than the first phase of a phased strata plan by no later than 90 days following the deposit of that phase in the land title office.

Should the Strata Property Regulation restrict a phased strata's ability to amend bylaws relating to pets, rentals, age, and marketing?

Brief description of the issue

Section 13.3 (2) of the regulation restricts the ability of a strata corporation that is being developed in phases to amend bylaws relating to certain listed subjects. These subjects are the following:

- the keeping or securing of pets;
- the restriction of rentals;
- the age of occupants;
- the marketing activities of the owner developer which relate to the sale of strata lots in the strata plan.⁶⁸³

So long as the owner-developer remains "in compliance with the dates for the beginning of construction of each phase," the strata corporation can't "create, change, repeal, replace, add to or otherwise amend" bylaws dealing with these four subjects.⁶⁸⁴ This restriction stays in effect until

683. *Supra* note 2, s 13.3 (2).

684. *Ibid*, s 13.3 (2). The relevant dates are the dates as "set out in the Phased Strata Plan Declaration or amended Phased Strata Plan Declaration" (*ibid*).

Consultation Paper on Complex Stratas

- the strata corporation holds “the annual general meeting held following the deposit of the final phase,”⁶⁸⁵
- the owner-developer makes an election not to proceed,⁶⁸⁶ or
- the strata corporation “obtains the written consent of the owner developer.”⁶⁸⁷

These restrictions override the general rule,⁶⁸⁸ which gives strata corporations a liberal hand to amend their bylaws,⁶⁸⁹ in order to facilitate the phasing process. Should the regulation continue to limit the power of strata corporations to make their own decisions on these topics?

Discussion of options for reform

The committee considered three broad options to address this issue for reform: retaining the current regulation, repealing it, and amending its timing rules on when the restriction is lifted from a phased strata corporation.

The main benefit of the current provision is that it supports the owner-developer’s interest in marketing strata lots in the phased strata. All four subjects embraced by this provision are likely to be among the top-of-mind concerns for potential purchasers. For example, moving from an open-ended to a restrictive rental or pet by-law would reduce the pool of potential purchasers of strata lots. In a similar vein, the marketing of a development to older adults could be upended if an age-restriction bylaw were repealed.

685. *Ibid*, s 13.3 (2). See also *Strata Property Act*, *supra* note 1, s 230 (requirement to hold annual general meeting after deposit of subsequent phase).

686. See *supra* note 2, s 13.3 (2). See also *Strata Property Act*, *supra* note 1, ss 235 (elections not to proceed), 236 (2) (deemed election not to proceed due to delay in proceeding).

687. *Supra* note 2, s 13.3 (2).

688. See *Strata Property Act*, *supra* note 1, s 126, 128 (“(1) . . . amendments to bylaws must be approved at an annual or special general meeting, (a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote, (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.”).

689. But see *ibid*, s 121 (unenforceable bylaws).

The downside of the current approach is that it achieves this result by bluntly restricting a phased strata corporation's power to govern itself. It could be argued that this provision doesn't strike the right balance between the interests of the owner-developer and strata-lot owners. The current rule gives the owner-developer a veto over these areas of the strata property's governance. This policy choice, in effect, allows marketing to trump any concerns that strata-lot owners may have regarding these four subjects. Owners may feel that the ordinary rule for bylaw amendment (which generally calls for amendments to be approved by passage of a resolution by a 3/4 vote)⁶⁹⁰ may strike a better balance.

There are essentially two approaches to address these concerns about the current rule. One approach would be to repeal the regulation. As a result, these four topics would become subject to the general rule on bylaw amendments. This result would enhance the strata corporation's control over its own governance. It would be consistent with what the court of appeal has recently described (in another context) as "the foundational democratic principles that pervade the [*Strata Property*] Act."⁶⁹¹

But this approach would create difficulties for an owner-developer. The marketing of a phased strata property would be much more challenging if the strata-lot owners had the power to amend bylaws on these four subjects. Even if that power were never exercised, the uncertainty created by opening up this area of the law would complicate the owner-developer's disclosure obligations. These challenges could erode the desire of owner-developers to create phased strata properties, leading to a decline in their use. This could limit the variety and sophistication of the strata-property market. It could also spur developments that attempt to create approximations of the phased-strata form outside the legal framework provided by the *Strata Property Act*.

The other option for reform that the committee considered would be to retain the broad features of the current rule but amend it in such a way as to strike a more equitable balance between the owner-developer's and the owners' interests. The actual amendment could take on a wide variety of details. The point would be to find a compromise that preserves the owner-developer's ability to effectively market strata lots while giving the strata corporation more control over its governance. Such an approach does carry the risk, of course, of pleasing neither group.

690. See *ibid*, s 128 (noting special rules apply to strata plans composed entirely of non-residential strata lots or of both residential and non-residential strata lots).

691. *Norenger Development (Canada) Inc v The Owners, Strata Plan NW 3271*, 2016 BCCA 118 at para 68 [2016] BCJ No 508 (QL), Kirkpatrick JA (for the court) (appeal of an order appointing an administrator under s 174 (7) of the act).

The committee's tentative recommendation for reform

The committee decided that the third option was the best option for this issue. It favoured a compromise approach to the problems posed by the regulation.

The committee noted that this provision works reasonably well in most cases. But it could be a sticking point when the phased strata plan is taking a longer-than-usual time to unfold. The committee considered adding a hard deadline to this provision, providing, for example, that it lapses five years from the date the first phase of the phased strata plan is deposited in the land title office. In the end, the committee decided not to follow this approach. Although it had the benefit of certainty, that benefit was achieved by its arbitrariness.

The better approach would be to tie the sunset date for this provision into the Phased Strata Plan Declaration. The declaration calls for “a schedule setting out the estimated date for the . . . completion of construction of each phase.”⁶⁹² In the committee’s view, it would be acceptable to end this provision’s sway over a strata corporation six months after this estimated date.

The committee tentatively recommends:

59. Section 13.3 (2) of the Strata Property Regulation should restrict the ability of a phased strata property to amend bylaws dealing with the keeping or securing of pets, the restriction of rentals, the age of occupants, or the marketing activities of the owner-developer which relate to the sale of strata lots in the strata plan until the earliest of the following: (a) the annual general meeting held following the deposit of the final phase; (b) an election not to proceed is made under section 235 or 236 (2) of the act; (c) the strata corporation obtains the written consent of the owner-developer; (d) the owner-developer is not in compliance with the dates for the beginning of construction of each phase as set out in the Phased Strata Plan Declaration or amended Phased Strata Plan Declaration; (e) the date that is six months after the date of completion of construction disclosed in section 2 (c) of the original Phased Strata Plan Declaration.

692. *Strata Property Regulation*, *supra* note 2, Form P.

Should an owner-developer be required to identify how it intends to designate parking and storage lockers on the Phased Strata Plan Disclosure form?

Brief description of the issue

Parking stalls and storage lockers have raised many concerns for strata corporations generally.⁶⁹³ The committee understands that one problem that plagues phases involves the inconsistent assignment of parking stalls and storage lockers. For example, a phased strata plan may contemplate phases in separate buildings over a common underground parking garage. Parking spaces were allocated by lease or licence to the strata lots in the first phase. No parking spaces were identified for the (still unbuilt) other phases. The owner-developer begins to assign parking spaces but doesn't make these assignments on a consistent basis. Confusion reigns among the owners and the strata manager. Can legislative or regulatory changes alleviate this confusion?

Discussion of options for reform

The committee considered two broad options for reform: a legislative or regulatory change calling for greater disclosure of parking-stall and storage-locker arrangements to incoming owners and no legislative or regulatory change, relying instead on industry practices and continuing education to address any problems.

Some developers use easements to address concerns about parking and storage in a phased strata. Education could make their techniques more widely known. This approach may have several advantages over legislative changes. Its main advantage is its flexibility. As phased developments become more and more sophisticated, problems with parking and storage may become more complex. Finely crafted solutions may be needed to address them. A one-size-fits-all approach could end up creating more problems than it solves. Relying on education and industry practices may also end up being less disruptive or costly than new legislation.

But the drawback with this approach is its inconsistency. By its nature, it means that some developments will use one solution for parking and storage issues while others will adopt different solutions. This inconsistency can breed confusion in purchasers, owners, and strata managers.

693. See e.g. Mangan, *supra* note 9 at 283–85.

The committee also considered two means to provide greater disclosure on these issues. One involved amending the *Real Estate Development Marketing Act*.⁶⁹⁴ This act requires extensive disclosure to purchasers of real estate. Among the topics it covers are parking stalls and storage lockers. So in this sense it would be a natural fit for new rules on disclosure concerning parking and storage in a phased strata plan. But in a broader sense what is needed to address this issue for reform would be an outlier for an act concerned with the marketing of real estate. The concerns raised by this issue have more to do with the ongoing operation of strata properties.

This consideration led the committee to consider another approach to providing disclosure, one that would focus on changes to the *Strata Property Act* or its regulations. The existing vehicle for disclosure under the act is the Phased Strata Plan Declaration. Locating disclosure about parking-stall and storage-locker arrangements on this form would create greater clarity. It would also establish greater certainty on these matters, as an amendment to the declaration would require the approval of an approving officer.⁶⁹⁵ The downside of this approach is that it would create a new source of information on parking stalls and storage lockers in a phased strata plan, in addition to the disclosure already required under the *Real Estate Development Marketing Act*. As a result, there is the potential for inconsistencies and conflicts between the two documents.

The committee's tentative recommendation for reform

The committee is of the view that increased disclosure and certainty is needed to address problems with parking stalls and storage lockers in phased strata plans. The committee believes that the best place for this disclosure is in a revised Phased Strata Plan Declaration. Problems in this area tend to arise in later phases, at a time after marketing of new strata-lots. This makes disclosure under the *Real Estate Development Marketing Act* a less relevant and practical option for addressing what are often operational issues.

The committee was of the view that the designers of the Phased Strata Plan Declaration form should consider using a list of options for designating parking and storage lockers, with a check box next to each option.

The committee tentatively recommends:

60. The Phased Strata Plan Disclosure form should be amended to require an owner-developer to identify how it intends to designate parking and storage lockers.

694. *Supra* note 645.

695. See *Strata Property Act*, *supra* note 1, s 233 (1).

ISSUES FOR REFORM—PROTECTING THE FINANCIAL INTERESTS OF OWNERS IN A PHASED STRATA PLAN

Should the Strata Property Regulation continue to require the owner-developer, after the deposit of a phase subsequent to the first phase, to prepare an interim budget for the entire strata corporation?

Brief description of the issue

An interim budget has been described as “an excellent bridge for the transition from developer to strata council.”⁶⁹⁶ Immediately after the deposit of a strata plan the owner-developer owns all the strata lots and is responsible for all strata-corporation expenses.⁶⁹⁷ A budget isn’t needed at this time. Eventually, strata-lots are sold off to purchasers. Once (1) 50% plus one of these strata lots are sold to purchasers or (2) nine months has elapsed since the date of the first sale of a strata lot, a six-week window opens, during which the owner-developer must hold the strata corporation’s first annual general meeting.⁶⁹⁸ One of the items on the agenda for that meeting is adoption of the strata corporation’s first budget.⁶⁹⁹

The transitional period during which an interim budget holds sway runs from the date of the first sale of a strata lot to the date on which the first strata-corporation budget is approved. An interim budget is prepared by the owner-developer,⁷⁰⁰ according to standards set out in the *Strata Property Act*.⁷⁰¹

When it comes to phased strata plans, the first phase simply follows the pattern described for strata corporations generally in the two preceding paragraphs.⁷⁰² But

696. Fanaken, *supra* note 9 at 13.

697. See *Strata Property Act*, *supra* note 1, s 7.

698. See *ibid*, s 16 (1).

699. See *ibid*, s 20 (2) (b).

700. See *ibid*, s 13 (1) (a) (owner-developer must “prepare an interim budget for the strata corporation for the 12 month period beginning the first day of the month following the month in which the first conveyance of a strata lot to a purchaser occurs”).

701. See *ibid*, s 13 (2).

702. See *Strata Property Regulation*, *supra* note 2, s 13.4 (1).

things are more complicated when a new phase is deposited in the land title office after the phased strata corporation has adopted its own budget. The new phase has its own transition from owner-developer responsibility for expenses to strata-lot owner control of the budget. This calls for an interim budget.⁷⁰³ The question is how this interim budget should mesh with the existing strata corporation budget. The answer given by the case law is that this interim budget replaces the strata-corporation budget and applies to the whole strata corporation.⁷⁰⁴ As a bit of a compromise measure, “the *Act* attempts to respect the budget adopted at the annual general meeting by requiring that the new interim budget, which the owner developer must prepare, be based on the budget adopted at that annual general meeting.”⁷⁰⁵

This conclusion has been criticized.⁷⁰⁶ Should the relevant provisions of the *Strata Property Regulation* be amended to bring about a different result?

Discussion of options for reform

The committee considered four options for this issue: (1) continue to require the owner-developer to prepare the interim budget for the entire strata corporation; (2) require the owner-developer to prepare an interim budget only for the strata lots in the subsequent phase; and (3) require the strata corporation to approve a new budget after deposit of a subsequent phase for the entire strata corporation (including the strata lots in the new phase); and (4) require interim budgets to more closely adopt the figures in the strata-corporation budget—that is, make them meet a higher standard than being merely “based on” the strata-corporation budget.

The first option is to retain the status quo. This option aligns the rules for phases with the general rules for budgets in the early life a strata corporation. Since the owner-developer will typically own the bulk of the strata lots in this period and will be actively engaged in marketing those strata lots it makes some sense to make the budget the owner-developer’s responsibility.

703. See *ibid*, s 13.4 (5) (a).

704. See *Owners, Strata Plan KAS 3485 v 0703008 B.C. Ltd*, 2011 BCSC 1655 at paras 16–20, [2011] BCJ No 2327 (QL) [*Strata Plan KAS 3485*]. See also *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.27 (“the new interim budget to be prepared for a subsequent phase is a budget for the *entire strata corporation*, not just for the strata lots in that phase” [emphasis added]).

705. *Strata Plan KAS 3485*, *supra* note 704 at para 18, Barrow J.

706. See *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.27.

A straight application of the general rule might cause problems in a phased strata plan if the strata property has already made it a significant way through the phasing process. So the regulation modifies the general rule for cases in which a strata corporation has adopted its own budget. When this has occurred, the owner-developer's interim budget "must be based on the budget approved by the strata corporation."⁷⁰⁷ So the current rules make some allowance for the views of strata-lot owners, even though the final decision on the interim budget rests with the owner-developer.⁷⁰⁸

This last point captures the downside of the first option. It represents a significant erosion of the democratic character of a strata corporation. As one commentator has pointed out, "permitting the owner developer to override the duly approved budget of an operating strata corporation" may lead to "somewhat surprising and potentially destabilizing" results.⁷⁰⁹ These types of results may be more pronounced in a strata property that is taking a long time to go through the phasing process. In these cases, a fully fledged strata corporation could find itself operating for long stretches under its own budgets, only to be sent back to the interim-budget stage from time to time. In addition to being at odds with the concept of democratic rule in a strata corporation, this result could produce administrative confusion. It's also worth bearing in mind that the relationship between the owner-developer and the strata-lot owners can often be fraught.⁷¹⁰ Shifting the responsibility for something as fundamental as a budget back to the owner-developer could end up exacerbating other disputes between strata-lot owners in the early phases and the owner-developer.

The second option addresses these concerns. It would allow most of the strata corporation to carry on under its approved budget while those strata lots in the new phase would be subject to the interim budget. This compromise approach likely best reflects the states of development for the various component parts of the phased strata plan, as well as the expectations of strata-lot owners and the owner-developer. It avoids the "potentially destabilizing" result of having an operating strata corporation's budget overridden by an owner-developer's interim budget. It also makes some allowance for the different position of the strata lots in the new phase, and it supports the owner-developer's disclosure obligations and marketing goals with respect to those strata lots.

707. See *Strata Property Regulation*, *supra* note 2, s 13.4 (5) (a).

708. See *Owners, Strata Plan KAS 3485*, *supra* note 704 at para 18.

709. *British Columbia Strata Property Practice Manual*, *supra* note 9 at § 17.27.

710. See Fanaken, *supra* note 9 at 17 ("It is not surprising that developers do not appear at first AGMs as they tend to be beat up over a wide variety of issues by disgruntled owners.").

The downside of this option is that it goes against the general thrust of the act's and the regulation's approach to governance for phased strata plans. That approach involves integrating subsequent phases into the existing strata corporation as quickly as possible. The act provides that the strata corporation created by the deposit of a new phase is automatically amalgamated with the strata corporation created by the deposit of the first phase.⁷¹¹ The "owners of the strata lots in the phase are members of the strata corporation established by the deposit of the strata plan for the first phase."⁷¹² This option for reform would begin to unwind this broader approach to integrating new phases, at least as far as budgeting was concerned. It would provide that a subgroup within the strata corporation has its financial matters governed by its own, separate budget. This result would be somewhat analogous to what prevails in a strata corporation with sections, except that here the strata lots in a new phase wouldn't be considered a separate entity. This could result in some conceptual confusion and possibly some administrative difficulties.

The third option for reform would address these issues, as well as make it clear that the democratic principle should govern in setting strata-corporation budgets. Under this approach, a phased strata corporation that has already adopted a budget would be required to adopt a new budget when a subsequent phase comes on line. This would result in an integrated strata-corporation budget that was approved through the act's ordinary processes for collective decision-making. This option would also be consistent with the act's goal of integrating new phases into the strata corporation as soon as possible.

Converting the requirement to prepare an interim budget into a requirement for a new strata-corporation budget creates a tight deadline in this example between the deposit of the third phase and the need to have the budget come into effect.⁷¹³ In addition to timing concerns, the task at hand could bring with it further problems. As one commentator has noted, "[p]reparing a first budget for a strata corporation is

711. See *supra* note 1, s 228 (1) (b).

712. *Ibid*, s 228 (1) (c).

713. Existing notice requirements would make it impossible to hold a general meeting to consider the budget within this period. See *Strata Property Act*, *supra* note 1, s 45 (1) ("The strata corporation must give at least 2 weeks' written notice of an annual or special general meeting to all of the following: (a) every owner, whether or not a notice must also be sent to the owner's mortgagee or tenant; (b) every mortgagee who has given the strata corporation a Mortgagee's Request for Notification under section 60; (c) every tenant who has been assigned a landlord's right to vote under section 147 or 148, if the strata corporation has received notice of the assignment.").

not easy.”⁷¹⁴ Obtaining accurate estimates of expenses is a real challenge. And these estimates will end up being the key determinant of strata fees.⁷¹⁵ These general points for strata corporations will likely apply when a new phase is brought on line. Finally, moving directly to a strata-corporation approved budget for a new phase could complicate both the owner-developer’s disclosure obligations and its efforts to sell strata lots in that new phase.

The fourth option would retain much of the current framework. Its major change would be to tie the owner-developer’s interim budget much more closely to the strata-corporation budget. Instead of being merely “based on” the strata-corporation budget, the interim budget would have to adopt the same financial structure that was used in the strata-corporation budget.

This option is based on the insight that strata-corporation budgets are usually more realistic than interim budgets. Strata-lot owners may be surprised by increases in strata fees that occur when moving from an interim to a strata-corporation budget. This option would address that problem by injecting more realism into the interim budget from the start.

The downside of this approach lies in the difficulty in spelling out suitably directive standards in the regulation. Given the increasing diversity in phased strata plans, the resulting regulations would have to be highly detailed and complex.

The committee’s tentative recommendation for reform

In the committee’s view, the current rule needs reform. It represents too great an intrusion on the democratic governance of strata corporations. It also thrusts a responsibility on owner-developers that they, in most cases, would not welcome.

Limiting the reach of the interim budget to the strata lots in the new phase is a pragmatic solution to these problems. It doesn’t come with the administrative burdens or legislative complexity of options three and four. It also has the least impact on the owner-developer’s marketing interests and disclosure obligations.

The committee tentatively recommends:

61. If a strata corporation for a phased strata plan has adopted its own budget, then the Strata Property Regulation should require an owner-developer, after the deposit of

714. Fanaken, *supra* note 9 at 13.

715. See Fanaken, *ibid.*

a phase subsequent to the first phase, to prepare an interim budget that is only applicable to the strata lots in that subsequent phase.

Should the Strata Property Regulation be amended to require a strata corporation to account separately for the revenue and expenses during the interim-budget period after deposit of a phase subsequent to the first phase in the land title office?

Brief description of the issue

This issue arose as a consequence of the committee's tentative recommendation for the previous issue. An interim budget applicable to strata lots in a new phase may be created by the owner-developer but it will be administered by the strata corporation. Should the strata corporation be required to account separately for the administration of those funds?

Discussion of options for reform

This issue really only has one legislative option for reform. Either the regulation governing these matters is amended to require separate accounting or the law is left silent on this issue and it's left up to strata corporations to determine whether best practices call for separate accounting.

The main advantage of amending the regulation is that it would provide a clear direction for strata corporations. An amendment would also support the committee's previous tentative recommendation regarding interim budgets. It might help to make any changes in administrative practices as a result of that tentative recommendation smoother to implement. Amending the regulation would also help to ensure the viability of existing safeguards in the act regarding interim budgets.⁷¹⁶ These safeguards turn on whether the owner-developer's estimates of expenses in the

716. See *supra* note 1, s 14 (4)–(6) (“(4) Subject to subsection (5), if the expenses accrued by the strata corporation, for the period referred to in subsection (1), are greater than the operating expenses estimated in the interim budget for that period, the owner developer must pay the difference to the strata corporation within 8 weeks after the first annual general meeting. (5) If the accrued expenses referred to in subsection (4) are 10% or more greater than the operating expenses estimated in the interim budget for that period, the owner developer must include in the payment referred to in subsection (4) an additional amount calculated according to the regulations. (6) If the expenses accrued by the strata corporation, for the period referred to in subsection (1), are less than the operating expenses estimated in the interim budget for that period, the strata corporation must refund the difference to the owners in amounts proportional to their contributions.”).

interim budget end up being greater or less than the actual expenses by a specified percentage amount. If the accounts for the strata-corporation budget and the interim budget aren't kept separate, then there is no way to make this determination.

Amending the regulation may have downsides. At a minimum, it will make the regulation longer and more complex. It may create its own administrative burdens too.

The committee's tentative recommendation for reform

The committee favours amending the *Strata Property Regulation* to provide for separate accounting for the interim budget. This amendment is a natural extension from its previous tentative recommendation.

The committee tentatively recommends:

62. The Strata Property Regulation should be amended to require a strata corporation to account separately for the revenue and expenses during the interim-budget period after deposit of a phase subsequent to the first phase in the land title office.

Should the Strata Property Act continue to require approval by an approving officer of security for common facilities?

Brief description of the issue

The *Strata Property Act's* main area of concern in protecting the financial interests of owners involves protections of expectations around common facilities.⁷¹⁷ One of its safeguards applies when “common facilities are to be constructed in a phase other than the first phase, or constructed on a separate parcel.”⁷¹⁸ In these circumstance, an approving officer “may only approve the Phased Strata Plan Declaration if the owner developer”:

- posts a bond, an irrevocable letter of credit or other security in an amount that, in the opinion of the approving officer, is sufficient to cover the full cost of constructing the common facility, including the cost of the land, or
- makes other arrangements, satisfactory to the approving officer, to ensure the completion of the common facility.⁷¹⁹

717. See *ibid*, s 217 (“ ‘common facility’ means a major facility in a phased strata plan, including a laundry room, playground, swimming pool, recreation centre, clubhouse or tennis court, if the facility is available for the use of the owners”).

718. *Ibid*, s 223 (1).

719. *Ibid*, s 223 (1).

Approving security arrangements isn't a clear fit with the approving officer's general mandate to deal with land-use issues. Is there a better regulatory option that could be put in place to ensure protection of strata-lot owners' interests?

Discussion of options for reform

This oversight provision appears to be a valuable part of the legal framework for phased strata plans. So the committee only considered options that would substitute a different actor for the role the approving officer currently plays. Two potential overseers are the superintendent of real estate and the supreme court.

The superintendent of real estate has a consumer-protection dimension to its mandate. In this respect, it could be a better fit for this role than the approving officer. But the downside of this option is that the superintendent has no other part to play in the phasing process. Other aspects of the process continue to lend themselves to oversight by an approving officer. So transferring this issue to the superintendent would lead to a division of regulatory oversight.

The supreme court has established expertise in hearing evidence and making decisions. But that expertise is engaged in dispute resolution, not regulatory oversight. Transferring this issue to the court would likely engage some of the drawbacks of the dispute resolution process, which include added costs, administrative burdens, and timelines.

The committee's tentative recommendation for reform

The committee is of the view that the approving officer remains the best option for overseeing this part of the phasing process. While there may be some scope for concerns about how this issue fits within the approving officer's mandate, the other options for this oversight role each come with significant drawbacks. In the committee's opinion, the advantages that may be gained by a change don't outweigh those disadvantages.

The committee tentatively recommends:

63. Section 223 of the Strata Property Act should continue to require an approving officer's approval of security for common facilities.

Should the Strata Property Act be amended to give an approving officer powers to charge a fee for approval of a Phased Strata Plan Declaration and to call for a verified estimate of the cost to construct common facilities?

Brief description of the issue

This issue flows from the previous one. If the approving officer is going to continue to oversee security for common facilities, then can the legislation give the approving officer tools to perform this task more efficiently?

Discussion of options for reform

The committee focussed on two changes that would bolster the oversight regime. One would be a provision allowing the approving officer to require the owner developer to provide an estimate of the cost of common facilities. This estimate would be verified by the certificate of a registered architect or professional engineer, in a manner analogous to the existing rules on release of security.⁷²⁰ The second would be a provision allowing the approving officer to charge a reasonable fee for reviewing the Phased Strata Plan Declaration.

These changes would, in all likelihood, strengthen the regulatory regime by supporting the approving officer's oversight role. Their downside is that they would impose costs and delays on owner-developers.

The committee's tentative recommendation for reform

The committee favours giving these powers to approving officers. These new powers will give added support to the consumer-protection and public-interest rationales for the regulatory framework. The advantages that will flow from them outweigh the costs and burdens they will add to owner-developers in developing a phased strata plan.

The committee tentatively recommends:

64. Section 223 of the Strata Property Act should be amended to provide that an approving officer may (a) charge a reasonable fee to the owner-developer for approving the Phased Strata Plan Declaration and (b) require the owner-developer to provide an estimate of the cost of common facilities that are to be constructed in a phase other

720. See *ibid*, s 226 (1) (a).

than the first phase, or constructed on a separate parcel, which estimate must be verified by the certificate of a registered architect or professional engineer.

Should an owner-developer be required to ensure that the term of any insurance policy entered into by or on behalf of a phase subsequent to the first phase in a phased strata plan continues for at least four weeks after the new phase is deposited in the land title office?

Brief description of the issue

As a strata property is developed, it is important to ensure that it has insurance coverage through the transition of control from the owner-developer to the strata corporation. While the strata property is under construction, the owner-developer will carry course-of-construction insurance. The *Strata Property Act* spells out the property insurance that a strata corporation must carry.⁷²¹

In most strata properties, the owner-developer manages the transition in insurance coverage. It is initially responsible for obtaining the strata corporation's property insurance—a responsibility that arises upon deposit of the strata plan. Responsibility for insurance passes to the strata council when the first council is formed at the strata corporation's first annual general meeting. To smooth the handoff from owner-developer to strata corporation, the *Strata Property Act* contains a special rule. This rule provides that the owner-developer “must ensure that the term of any insurance policy entered into by or on behalf of the strata corporation continues for at least 4 weeks after the first annual general meeting.”⁷²²

The phasing process makes this transition more complicated. The picture is relatively clear for the first phase. The rule extending coverage for at least four weeks after the first annual general meeting applies in this case.⁷²³ It's phases subsequent to the first phase that pose the problem. The regulation provides that the rule calling for a

721. See *ibid*, s 149 (1) (“The strata corporation must obtain and maintain property insurance on (a) common property, (b) common assets, (c) buildings shown on the strata plan, and (d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.”).

722. *Ibid*, s 15.

723. See *Strata Property Regulation*, *supra* note 2, s 13.4 (1) (providing generally that owner-developer's obligation from part 3 of the act—which include the obligation set out in section 15—apply to the first phase).

four-week extension in coverage doesn't apply to any new phase deposited after the phased strata corporation has held its first annual general meeting.⁷²⁴ This creates a hard transition in responsibility for insurance coverage from owner-developer to strata corporation upon deposit of the new phase in the land title office. Although the owner-developer is required to notify the strata corporation when it plans to deposit a new phase,⁷²⁵ this notice often doesn't give strata corporations enough time to arrange property insurance for the new phase. This creates the potential for gaps in insurance coverage. Should the act be amended to address the possibility that a gap in insurance coverage may result on the deposit of a new phase?

Discussion of options for reform

Since any gap in insurance coverage could have catastrophic consequences for a strata corporation, leaving the potential for such a gap to develop wasn't considered an option for this issue. The committee considered two options designed to ensure such a gap wouldn't appear.

The first option was to require an extension of the owner-developer's insurance coverage for four weeks after the deposit of a new phase. This option is analogous to the *Strata Property Act's* existing rule, with the reference point of the first annual general meeting changed to the deposit of the new phase. The advantage of this approach is that it gives a strata corporation a reasonable amount of time to obtain its own coverage for property in the new phase. The possibility of a gap in coverage is thereby dramatically lowered, if not entirely eliminated. This approach also extends an existing rule in the act, which ensures some familiarity for participants in the real-estate development sector.

There are disadvantages to this approach. The deposit of a new phase isn't identical to the situation covered by the existing rule. The existing rule contemplates the owner-developer obtaining strata-corporation property insurance upon deposit of the strata plan and extending that coverage to at least four weeks after the strata corporation's first annual general meeting. This option, in contrast, contemplates extending the owner-developer's existing insurance coverage during construction for four weeks after the first phase, in order to give the strata corporation time to obtain property insurance. There is a possibility that an owner-developer's coverage might not be appropriate in all cases. This approach also creates the possibility of double coverage for a time. Finally, this option will also increase costs for the owner-developer. These costs are likely to be passed on to strata-lot owners.

724. See *ibid*, s 13.4 (2), (4) (5).

725. See *Strata Property Act*, *supra* note 1, s 229.

The other option the committee considered was extending the notice period for deposit of a new phase. The current rule simply provides that an owner-developer must “immediately notify” the strata corporation.⁷²⁶ The committee understands that, in practice, this tends to result in the strata corporation receiving notice on the day of deposit. Providing a set notice period of, for example, four weeks would give the strata corporation time to arrange insurance coverage before the new phase is deposited in the land title office.

The downside of this approach is that it relies on the owner-developer having a definite sense of when the new phase will be deposited weeks before it happens. In practice, this isn’t always the case. A longer notice period could end up being routinely flouted, as owner-developers simply won’t have the information needed to comply with it. A shorter notice period would be more realistic, but it would also leave in place the possibility that a gap in insurance coverage could result.

The committee’s tentative recommendation for reform

The committee favours extending, by analogy, the current rule generally applicable to strata corporations. Although there may be some disadvantages to this approach, it best addresses the underlying issue and provides the best assurance that a gap in insurance coverage won’t occur.

The committee tentatively recommends:

65. Despite the Strata Property Regulation, the owner-developer should be required to ensure that the term of any insurance policy entered into by or on behalf of a phase subsequent to the first phase in a phased strata plan continues for at least four weeks after the subsequent phase is deposited in the land title office.

⁷²⁶ *Ibid*, s 229.

Should the Strata Property Act provide that the owner-developer be considered to have an insurable interest in any property insured under an insurance policy that continues in effect for at least four weeks after the new phase is deposited in the land title office?

Brief description of the issue

This issue—and the two that follow—arises as a consequence of the committee’s tentative recommendation to address the previous issue. When a new phase is deposited in the land title office, the act provides that “the strata corporation established by the deposit of the phase is amalgamated with the strata corporation established by the deposit of the strata plan for the first phase.”⁷²⁷ If the owner-developer’s insurance is extended for four weeks after deposit, then this rule could create a question about whether the owner-developer has an insurable interest in the property insured. Should the legislation address this possibility?

Discussion of options for reform

Expressly providing that the owner-developer has an insurable interest during the period its insurance is extended pre-empts any disputes that could arise on that score. In this way, it creates clarity and certainty.

The only possible downside of this option for reform is that it could be argued that it isn’t necessary to make this point expressly in the act. It may be implicit in the previous tentative recommendation. So it could just end up making the act longer.

The committee’s tentative recommendation for reform

The committee favours clarifying this issue by stating an express rule.

The committee tentatively recommends:

66. The Strata Property Act should provide that the owner-developer should be considered to have an insurable interest in any property insured under an insurance policy that continues in effect for at least four weeks after the subsequent phase is deposited in the land title office.

727. *Ibid*, s 228 (1) (b).

Should the Strata Property Act provide for payment of funds to an insurance trustee under an insurance policy that continues in effect for at least four weeks after the new phase is deposited in the land title office?

Brief description of the issue

The *Strata Property Act* requires that insurance money only be paid out on a strata-corporation insurance policy to an insurance trustee.⁷²⁸ Should this rule be extended to an owner-developer's insurance policy that continues in effect after the deposit of a new phase?

Discussion of options for reform

Amending the act to extend this rule would support the proposal to continue an owner-developer's insurance in effect after deposit of a new phase. It would ensure that any insurance money paid out under that proposal is dealt with in a way consistent with the rules for strata corporations generally. It's difficult to see any downside to this approach.

The committee's tentative recommendation for reform

The committee favours extending the act's general rule covering payment of insurance money to an insurance trustee to an owner-developer's insurance that continues in effect after deposit of a new phase.

The committee tentatively recommends:

67. The Strata Property Act should provide that, despite the terms of an insurance policy that continues in effect for at least four weeks after the subsequent phase is deposited in the land title office, in making a payment, other than a payment arising from the liability of the strata corporation, under the strata corporation's insurance policy, an insurer must make the payment (a) to the order of the insurance trustee designated by the bylaws, or (b) if an insurance trustee is not designated, to the order of the strata corporation to be held in trust until paid out under section 157 of the Strata Property Act.

728. See *ibid*, s 156 ("Despite the terms of the insurance policy, in making a payment, other than a payment arising from the liability of the strata corporation, under the strata corporation's insurance policy, an insurer must make the payment (a) to the order of the insurance trustee designated by the bylaws, or (b) if an insurance trustee is not designated, to the order of the strata corporation to be held in trust until paid out under section 157.").

Should the Strata Property Act require an owner-developer to give a strata corporation for a phased strata plan an insurance appraisal for the full replacement value of a new phase no later than 14 days before the deposit of the new phase in the land title office?

Brief description of the issue

Property insurance for strata corporations must “be on the basis of full replacement value.”⁷²⁹ The prevailing practice is to establish the value of coverage by means of a third-party appraisal of the property.⁷³⁰ In the ordinary course, the strata corporation takes responsibility for obtaining an appraisal. Given the special circumstances of insurance coverage when a new phase comes online, should the owner-developer be required instead to obtain an appraisal?

Discussion of options for reform

There are essentially two options to consider for this issue. One option is to amend the act and make obtaining an appraisal the responsibility of the owner-developer in this case. The other is to leave the legislation as it is. This would mean that the strata corporation would have to make the decision to obtain an appraisal.

The advantage of the first option is practicality. The owner-developer remains in control of the property up to deposit of the new phase. It is best placed to obtain an appraisal of it for the strata corporation. The strata corporation can then use that appraisal to determine its coverage, after the transitional period ends.

The other option is to keep the legislation silent on this point. This would leave it to the strata corporation to obtain an appraisal, in fulfilling its obligations under the act.

The committee’s tentative recommendation for reform

The committee is of the view that its proposals for insurance and new phases would be supported and enhanced by requiring an owner-developer to obtain an appraisal for a new phase. In respect of timing, the committee determined that obtaining the

729. *Ibid*, s 149 (4) (a).

730. See Fanaken, *supra* note 9 at 117.

Consultation Paper on Complex Stratas

appraisal no later than 14 days before deposit would be reasonable and would best assist the strata corporation in acting upon the appraisal.

The committee tentatively recommends:

68. The Strata Property Act should require an owner-developer to give a strata corporation for a phased strata plan an insurance appraisal for the full replacement value of a new phase no later than 14 days before the deposit of the new phase in the land title office.

CHAPTER 6. CONCLUSION

The committee hopes to receive a wide range of responses to its tentative recommendations. Public comment is an integral part of the process of developing law-reform recommendations. Final recommendations are often shaped by input received at the consultation stage. The committee is proposing a host of changes to the *Strata Property Act* and the *Strata Property Regulation*, on which it would like to receive additional consideration before they are made final recommendations.

APPENDIX A

List of Tentative Recommendations

Sections—general

1. *The Strata Property Act and the Strata Property Regulation should continue to contain provisions enabling the creation and operation of sections. (53–57)*

Sections—qualifying conditions

2. *The Strata Property Act should continue to allow sections only for the purpose of representing the different interests of (a) owners of residential strata lots and owners of nonresidential strata lots, (b) owners of nonresidential strata lots, if they use their strata lots for significantly different purposes, or (c) owners of different types of residential strata lots. (58–60)*

Sections—creation

3. *The Strata Property Act should continue to permit an owner-developer to create sections. (60–62)*

4. *If an owner-developer creates sections at the time a strata plan is filed in the land title office, then the Strata Property Act should provide that, on or before the date of the strata corporation's second annual general meeting, the sections comprising the strata corporation may, by resolutions passed by a majority vote of each of the sections, cancel the sections. (63–64)*

5. *The Strata Property Act should provide that, if a section is created after a strata corporation's first annual general meeting, then the bylaws must set out the date of the first annual general meeting of the section. (64–65)*

6. *Section 193 of the Strata Property Act should be amended to clarify that creation or cancellation of a section requires a resolution passed by a 3/4 vote in all cases, despite the provisions of section 128 (1) (b) and (c), which allow amendments to a bylaw to be approved by a resolution passed by a voting threshold other than a 3/4 vote in the case of a strata plan composed entirely of nonresidential strata lots or in the case of a strata plan composed of both residential and nonresidential strata lots. (66–67)*

7. *Special forms should be prescribed under the Strata Property Act for the creation, amendment, and cancellation of a section. (67–68)*

8. *Section 193 (5) of the Strata Property Act should be repealed and section 250 (2) of the Strata Property Act should be amended to provide for the categorization of filings addressing the creation, amendment, and cancellation of sections. (68–69)*

Sections—powers and duties

9. *The Strata Property Act should provide that bylaws respecting sections cannot provide for the control, management, maintenance, use, and enjoyment of common property. (70–73)*

10. *The Strata Property Act should provide that bylaws respecting sections can provide for the control, management, maintenance, use, and enjoyment of common assets of the section or a strata lot of the section. (73–74)*

11. *Section 194 (2) (f) of the Strata Property Act should be retained as it is currently worded. (74–75)*

12. *Section 194 (4) of the Strata Property Act should be amended by striking out “only” and by adding as a new paragraph (c) the words “for any other purpose in the discretion of the section.” (75–76)*

13. *The Strata Property Act should provide that a mortgagee may give a Mortgagee’s Request for Notification to a section, as well as to the strata corporation. (76–77)*

14. *The Strata Property Act should require a section to file its correct mailing address, and any changes to that address, in the land title office. (77–78)*

Sections—governance

15. *The Strata Property Act should contain an express declaration that the act applies to sections. (78–79)*

16. *The Strata Property Act should require a section to provide an information certificate under section 59 for matters concerning the section on request by an owner, a purchaser, or a person authorized by an owner or a purchaser. (80–82)*

17. *The Form B (information certificate) for strata corporations should be modified to ask (a) does the strata corporation have sections, (b) if so, is this strata lot part of a section, and (c) if yes, which section does this strata lot belong to. (82–83)*

18. *The Strata Property Act should require a section to provide any information necessary to complete a certificate of payment under section 115 of the act within three days of a request from its strata corporation. (83–84)*

19. *A new form under the Strata Property Act should be created for the section to provide the requisite information to the strata corporation. (83–85)*

Sections—finances

20. *The Strata Property Act should enable sections to file a lien under section 116 of the act. (85–87)*

21. *If a strata corporation and a section both file liens under section 116 of the Strata Property Act with respect to the same strata lot, then the strata corporation's lien should rank in priority ahead of the lien of the section. (87–89)*

22. *A section's lien should rank in priority to every other lien or registered charge except (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation, (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or (c) if the other lien or charge is made under the Builders Lien Act. (89–90)*

23. *Section 112 of the Strata Property Act should be amended to provide that before a strata corporation or a section registers a lien under section 116 of the act against a strata lot, then that strata corporation or section must give notice, as the case may be, to the section or strata corporation. (90–91)*

24. *Consequential amendments should be made to sections 112 to 118 of the Strata Property Act to include sections. (91–92)*

25. *The Strata Property Act should expressly require a section within a strata corporation to have a separate budget. (92–94)*

26. *The Strata Property Act should provide that operating funds, contingency-reserve-fund funds, and special-levy funds must be accounted for separately and maintained in separate accounts in a financial institution for the strata corporation and for each section. (94–95)*

27. Section 192 (a) of the Strata Property Act should be amended by inserting after “bylaws that provide for the creation and administration of each section” the words “provided that the administration of expenses relates solely to the section.” **(96–97)**

Sections—cancellation

28. The Strata Property Act should require that a resolution to cancel a section must be approved by sectional 3/4 votes in each other existing section of the strata corporation. **(97–100)**

29. The Strata Property Regulation should require that the resolution to amend the bylaws to provide for the cancellation of a section must set out all of the following:

(a) any funds in the operating fund and contingency reserve fund for common expenses of the section have been transferred or disposed of; (b) any court proceeding or arbitration involving the section has been settled or discontinued; (c) any contracts in the name of the section have been assigned or terminated; (d) any land or other property held in the name of or on behalf of the section has been disposed of in accordance with the act; (e) any lien filed under section 116 of the act has been transferred or discharged; (f) any other charges, interests, liabilities, or assets of the section have been transferred or disposed of. **(100–05)**

Types—legislative enabling provision or definition

30. The Strata Property Act should contain a provision that expressly enables the creation of types of strata lots. **(118–19)**

Types—creation

31. The Strata Property Act should require, for a strata corporation to create a type of strata lot: (a) the strata corporation must hold an annual or special general meeting to consider the creation of the type; (b) the notice of meeting must include a resolution to amend the bylaws to provide for the creation of each type; and (c) the resolution referred to in (b) must be passed (i) by a 3/4 vote by the eligible voters of the strata lots comprising the type identified in the bylaw, and (ii) by a 3/4 vote by all the eligible voters in the strata corporation. **(119–20)**

32. The vote authorizing the creation, amendment, or cancellation of a type should require a resolution passed by a 3/4 vote in all cases, despite the provisions of section 128 (1) (b) and (c), which allow amendments to a bylaw to be approved by a resolution passed by a voting threshold other than a 3/4 vote in the case of a strata plan com-

posed entirely of nonresidential strata lots or in the case of a strata plan composed of both residential and nonresidential strata lots. (119–21)

33. If a strata corporation allocates expenses by types, then amendments to the strata corporation's bylaws concerning the allocation of an expense to a type must be approved at an annual general meeting or a special general meeting by both a resolution passed by a 3/4 vote of the strata corporation and a resolution passed by a 3/4 vote of the type. (119–21)

34. The Strata Property Act should allow an owner-developer to create types of strata lots at the time the strata plan is deposited by filing in the land title office bylaws that provide for the creation of each type. (121–22)

Types—sharing operating expenses

35. The Strata Property Regulation should continue to allow operating expenses (expenses that usually occur either once a year or more often than once a year) to be shared by types of strata lots. (122–23)

36. The Strata Property Regulation should not allow operating expenses (expenses that usually occur once a year or more often than once a year) to be shared by types of strata lots, if the expense is in relation to an item that does not exclusively benefit the type. (123–24)

37. Section 105 of the Strata Property Act should be amended to provide that, if a strata corporation has adopted a bylaw establishing types of strata lots, the strata corporation must carry out a year-end reconciliation and if, based on that reconciliation, there is a surplus or a shortfall with respect to a contribution to the operating fund that was shared only by owners of strata lots of that type, then the surplus or shortfall must be dealt with as follows: (a) in the case of a surplus, the surplus must be used to reduce the total contribution to the next fiscal year's operating fund by owners of strata lots of that type; (b) in the case of a shortfall, the shortfall must be eliminated during the next fiscal year by owners of strata lots of that type. (124–25)

Types—sharing capital expenses

38. The Strata Property Regulation should not allow capital expenses (expenses that occur less frequently than once a year) to be shared by types of strata lots, even if the capital expense relates to an item that benefits only the type of strata lot. (126–28)

39. The Strata Property Act should not allow a type of strata lot to have a contingency reserve fund. (128–30)

40. *The Strata Property Regulation should not allow capital expenses (expenses that usually occur less frequently than once a year) to be shared by types of strata lots, if the expense is in relation to an item that does not exclusively benefit the type. (130-31)*

Types—powers, duties, and governance

41. *The Strata Property Act should not authorize bylaws respecting types to provide for the control, management, maintenance, use, and enjoyment of the strata lots, common property, and common assets of the type or adjacent to the type. (131-32)*

42. *The Strata Property Act should not require that bylaws respecting types provide for the creation of a type executive. (132-33)*

Types—cancellation

43. *The Strata Property Act should require, for a strata corporation to cancel a type of strata lot: (a) the strata corporation must hold an annual or special general meeting to consider cancellation of the type; (b) the notice of meeting must include a resolution to amend the bylaws to provide for the cancellation of the types; and (c) the resolution referred to in (b) must be passed (i) by a 3/4 vote by the eligible voters of the strata lots comprising the type identified in the bylaw, and (ii) by a 3/4 vote by all the eligible voters in the strata corporation. (133-34)*

Phases—general

44. *The Strata Property Act should continue to enable the development of strata properties in phases. (171-73)*

Phases—applying to deposit a phased strata plan

45. *The Strata Property Act should continue to require an owner-developer to file a Phased Strata Plan Declaration as a condition to depositing a phased strata plan. (173-74)*

46. *The Strata Property Act should continue to require an owner-developer to obtain the approval of an approving officer to a phased strata plan. (174-75)*

47. *The Strata Property Act should provide that an approving officer's approval of a Phased Strata Plan Declaration expires after two years unless the first phase is deposited before that time. (176-78)*

48. *Section 228 of the Strata Property Act should be amended to provide that despite section 510 of the Local Government Act the deposit of a phase of a phased strata plan does not require provision of park land or payment for parks purposes. (178-79)*

Phases—changing circumstances

49. *The Strata Property Act should not be amended to allow a strata-lot owner or prospective strata-lot owner, a strata corporation, or an approving officer to apply to the supreme court for a mandatory injunction requiring the owner-developer under a phased strata plan to complete the phased strata in accordance with the Phased Strata Plan Declaration. (179-82)*

50. *The Strata Property Act should require an owner-developer to obtain the consent of the affected strata corporation to an election to extend the time to proceed, an election not to proceed, or other amendments to a Phased Strata Plan Declaration. (182-83)*

51. *The Strata Property Act should require that a strata corporation's consent to an amendment to a Phased Strata Plan Declaration should not be unreasonably withheld. (182-83)*

52. *The Strata Property Act should require that a strata corporation's consent to an amendment to a Phased Strata Plan Declaration should be required to be expressed by (a) a resolution of the strata corporation passed by a 3/4 vote and (b) the filing in the land title office of a Certificate of Strata Corporation in the prescribed form stating that the resolution referred to in paragraph (a) has been passed. (182-84)*

53. *Section 236 of the Strata Property Act should be amended to allow a strata corporation to apply to the supreme court for a declaration that the owner-developer be deemed to have elected not to proceed even if no order that the owner-developer complete the phase by a set date has been made. (184-86)*

54. *Section 232 of the Strata Property Act should be amended to provide that (a) an owner-developer may amend a Phased Strata Plan Declaration to extend the time for making an election to proceed with the next phase without applying to an approving officer for approval of the amendment and (b) an owner-developer must not amend a Phased Strata Plan Declaration to extend the time for making an election to proceed (i) more than once or (ii) for more than one year from the date stated in the declaration, except in accordance with an order of the supreme court. (186-88)*

Phases—governance and phased strata plans

55. A new, freestanding regulation should be adopted that expressly sets out the owner-developer's obligations from part 3 of the Strata Property Act upon deposit of a phase other than the first phase of a phased strata plan, which are currently incorporated by reference in section 13.4 of the Strata Property Regulation. **(188–89)**

56. Section 230 of the Strata Property Act, which requires a strata corporation to hold an annual general meeting during the six-week period that begins on the earlier of the date on which 50% plus one of the strata lots in the new phase have been conveyed to purchasers and the date that is six months after the deposit of the new phase, should be repealed. Consequential amendments should be made to sections 13.2 to 13.6 of the Strata Property Regulation. **(190–95)**

57. Section 13.5 of the Strata Property Regulation, which requires the election of two additional council members from the owners of a new phase at the phase annual general meeting that must be held after the deposit of a subsequent phase in the land title office, should be repealed. **(195–97)**

58. The Strata Property Regulation should require an owner-developer to turn over to the strata corporation the records listed in section 20 (2) (a) of the Strata Property Act for a phase other than the first phase of a phased strata plan by no later than 90 days following the deposit of that phase in the land title office. **(198–99)**

59. Section 13.3 (2) of the Strata Property Regulation should restrict the ability of a phased strata property to amend bylaws dealing with the keeping or securing of pets, the restriction of rentals, the age of occupants, or the marketing activities of the owner-developer which relate to the sale of strata lots in the strata plan until the earliest of the following: (a) the annual general meeting held following the deposit of the final phase; (b) an election not to proceed is made under section 235 or 236 (2) of the act; (c) the strata corporation obtains the written consent of the owner-developer; (d) the owner-developer is not in compliance with the dates for the beginning of construction of each phase as set out in the Phased Strata Plan Declaration or amended Phased Strata Plan Declaration; (e) the date that is six months after the date of completion of construction disclosed in section 2 (c) of the original Phased Strata Plan Declaration. **(199–202)**

60. The Phased Strata Plan Disclosure form should be amended to require an owner-developer to identify how it intends to designate parking and storage lockers. **(203–04)**

Phases—protecting the financial interests of owners in a phased strata plan

61. *If a strata corporation for a phased strata plan has adopted its own budget, then the Strata Property Regulation should require an owner-developer, after the deposit of a phase subsequent to the first phase, to prepare an interim budget that is only applicable to the strata lots in that subsequent phase. (205–10)*

62. *The Strata Property Regulation should be amended to require a strata corporation to account separately for the revenue and expenses during the interim-budget period after deposit of a phase subsequent to the first phase in the land title office. (210–11)*

63. *Section 223 of the Strata Property Act should continue to require an approving officer's approval of security for common facilities. (211–12)*

64. *Section 223 of the Strata Property Act should be amended to provide that an approving officer may (a) charge a reasonable fee to the owner-developer for approving the Phased Strata Plan Declaration and (b) require the owner-developer to provide an estimate of the cost of common facilities that are to be constructed in a phase other than the first phase, or constructed on a separate parcel, which estimate must be verified by the certificate of a registered architect or professional engineer. (213–14)*

65. *Despite the Strata Property Regulation, the owner-developer should be required to ensure that the term of any insurance policy entered into by or on behalf of a phase subsequent to the first phase in a phased strata plan continues for at least four weeks after the subsequent phase is deposited in the land title office. (214–16)*

66. *The Strata Property Act should provide that the owner-developer should be considered to have an insurable interest in any property insured under an insurance policy that continues in effect for at least four weeks after the subsequent phase is deposited in the land title office. (217)*

67. *The Strata Property Act should provide that, despite the terms of an insurance policy that continues in effect for at least four weeks after the subsequent phase is deposited in the land title office, in making a payment, other than a payment arising from the liability of the strata corporation, under the strata corporation's insurance policy, an insurer must make the payment (a) to the order of the insurance trustee designated by the bylaws, or (b) if an insurance trustee is not designated, to the order of the strata corporation to be held in trust until paid out under section 157 of the Strata Property Act. (218)*

Consultation Paper on Complex Stratas

68. *The Strata Property Act should require an owner-developer to give a strata corporation for a phased strata plan an insurance appraisal for the full replacement value of a new phase no later than 14 days before the deposit of the new phase in the land title office. (219-20)*

APPENDIX B

Summary Consultation

Introduction

The purpose of this summary consultation is to highlight three proposals from the British Columbia Law Institute's *Consultation Paper on Complex Stratas*. In the interest of brevity, background information and discussion of these proposals has been kept to a bare minimum. Citations and footnotes for the text have not been provided. If you wish to read about the issues raised in this summary consultation in depth, or if you want to comment on all of this consultation's 68 tentative recommendations (or a greater range of those tentative recommendations than is offered in this summary consultation), then you are encouraged to obtain a copy of the full *Consultation Paper on Complex Stratas* by downloading it for free from <http://www.bcli.org> or by contacting BCLI and asking us to send a hard copy to you.

How to respond to this summary consultation

You may respond to this summary consultation by email sent to strata@bcli.org. Alternatively, you may send your response by mail to 1882 East Mall, University of British Columbia, Vancouver, BC V6T 1Z1, by fax to (604) 822-0144, or by linking to an online survey through our website <http://www.bcli.org>.

If you want your comments to be considered in the preparation of the final report on complex stratas, then we must receive them by **15 January 2017**. BCLI expects to publish this report in early 2017.

About the British Columbia Law Institute

The British Columbia Law Institute is British Columbia's independent law-reform agency. Incorporated as a not-for-profit society in 1997, BCLI's strategic mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform. After public consultations, BCLI makes recommendations for legislative changes to the provincial government. BCLI's recommendations can only be implemented by British Columbia's legislative assembly, which is responsible for the enactment of legislation.

About the Strata Property Law (Phase Two) Project

This consultation forms part of a broader BCLI project on strata-property law. The Strata Property Law Project—Phase Two builds on the research and consultation carried out in the phase-one project. Phase two is concerned with making legislative recommendations to reform the *Strata Property Act* in the following seven major areas: (1) fundamental changes to a strata; (2) complex stratas; (3) selected governance issues; (4) common property; (5) selected land-title issues; (6) selected insurance issues; (7) leasehold stratas. Work on phase two began in summer 2013 and will carry on until the final report for the project is published in December 2017.

BCLI is carrying out the phase-two project with the assistance of an all-volunteer project committee. The members of the committee are:

Patrick Williams—chair
(Partner, Clark Wilson LLP)

Veronica Barlee (Jul. 2014–present)
(Senior Policy Advisor, Housing Policy Branch, Ministry of Natural Gas Development and Responsible for Housing)

Larry Buttress (Oct. 2013–Jun. 2016)
(Deputy Executive Officer, Real Estate Council of British Columbia)

Garth Cambrey
(Real Estate Institute of British Columbia)

Tony Gioventu
(Executive Director, Condominium Home Owners Association)

Tim Jowett
(Senior Manager, E-Business and Deputy Registrar, Land Title and Survey Authority)

Alex Longson (Jul. 2016–present)
(Senior Compliance Officer, Real Estate Council of British Columbia)

Judith Matheson
(Realtor, Coldwell Banker Premier Realty)

Elaine McCormack
(Partner, Wilson McCormack Law Group)

Doug Page (Oct. 2013–Jul. 2014)
(Manager, Housing Policy, Office of Housing and Construction Standards, Ministry of Natural Gas Development and Responsible for Housing)

David Parkin
(Assistant City Surveyor, City of Vancouver)

Allen Regan
(Vice-President, Bayside Property Services Ltd.)

Stanley Rule
(Lawyer, Sabey Rule LLP)

Sandy Wagner
(President of the Board of Directors, Vancouver Island Strata Owners Association)

Ed Wilson
(Partner, Lawson Lundell LLP)

Our supporters

The Strata Property Law Project—Phase Two has been made possible by project funding from the Real Estate Foundation of British Columbia, the Notary Foundation of British Columbia, the Ministry of Natural Gas Development and Responsible for Housing for British Columbia, the Real Estate Council of British Columbia, the Real Estate Institute of British Columbia, Strata Property Agents of British Columbia, the Association of British Columbia Land Surveyors, the Vancouver Island Strata Owners Association, and the Condominium Home Owners Association.

About strata-property law

When a landowner wants to develop a strata property this owner-developer must have a professional land surveyor create a strata plan. The owner-developer deposits this strata plan in the land title office. This act gives rise to the three defining characteristics of a strata property:

- (1) The units in a strata property—in British Columbia these units are called *strata lots*—are owned outright by individual owners. Each strata lot gets a separate title in the land title office. For strata lots, think of apartments in a multi-unit residential building—though they could also be offices in an office tower, commercial spaces in a business park, or even rooms in a hotel.
- (2) This individual ownership of strata lots is combined with collective ownership of the strata's common property and assets. These common elements can include things like lobbies, hallways, pipes and other building components installed between strata lots, and elevators. All the strata-lot owners own these common elements through a form of shared ownership called tenancy in common. In addition to shared ownership of property and assets, strata-lot owners also share liability for the strata's debts.
- (3) Finally, depositing a strata plan results in the creation of a strata corporation, which is given the responsibility to manage and maintain the strata's common property and assets for the benefit of all strata-lot owners. Each strata-lot owner is a member of the strata corporation.

In British Columbia, legislation called the *Strata Property Act* provides for these distinctive characteristics and sets out the rules for governance of strata properties. The *Strata Property Act* is largely made up of ideas, concepts, and rules drawn from older bodies of law, such as property law, contract law, and corporate law.

About complex stratas

The words *complex strata* don't appear anywhere in the *Strata Property Act*. In fact, *complex strata* isn't a legal term at all. It's a description, which kept coming up when BCLI was doing its consultations for phase one of the Strata Property Law Project.

A little historical background is necessary to understand the term. Strata-property legislation was introduced in British Columbia in the 1960s. At that time, strata properties were seen as a means to foster high-density residential housing. When policymakers thought of a strata property, what invariably came to mind was an image of a high-rise apartment building.

But there was nothing in the legislation that restricted strata properties to just this one type of residential development. And the real-estate sector quickly discovered that it could adapt strata properties to other kinds of uses. The result was more and more strata properties being built for commercial, industrial, office, and recreational purposes.

And this trend touched off two other trends. One involved combining two or more of these uses in a single building, creating a mixed-use strata. The other involved creating larger and more varied residential developments. These developments would boast a number of different architectural styles, such as an apartment building surrounded by townhouses. The large size of these developments allowed them to support a greater array of costly amenities, such as swimming pools, gyms, gardens, courtyards, and tennis courts.

It's these kinds of strata properties that, in the committee's view, have earned the title complex strata.

By the mid-1970s, complex stratas were fully established on the real-estate scene. So the legislation was amended to try to keep pace with them. This is the origin of the three subjects that form the heart of this consultation: (1) sections; (2) types; and (3) phases.

What are sections?

One judge has succinctly described sections as “mini strata corporations.” Sections are allowed to represent the different interests of groups of strata-lot owners in certain kinds of complex stratas.

There are two ways to create sections. The first way may only occur at the time the strata property is established—that is, when the owner-developer deposits the strata plan in the land title office. Certain documents must be attached to this strata plan. One of these documents is the strata property’s bylaws, which set out the ground rules for administering the strata corporation. The owner-developer may include in these bylaws provisions calling for the creation and governing the administration of a section or sections within the strata corporation. The second way involves an established strata corporation taking action to amend its bylaws. The strata corporation may set up a section if the bylaw amendment is approved by (1) a 3/4 vote of the eligible voters in the strata corporation and (2) a sectional 3/4 vote, that is a 3/4 vote of just the eligible voters within the proposed section.

Whether it’s done by the first way or the second, sections may only be created if one of the following three conditions is met:

- the strata property has both residential strata lots and nonresidential strata lots;
- the strata property has only nonresidential strata lots, but their owners are using the strata lots for significantly different purposes;
- the strata property has only residential strata lots, but those strata lots include at least two of the following:
 - apartment-style strata lots;
 - townhouse-style strata lots;
 - detached houses.

Once one of these conditions is met and the strata has created a section, that section has the same powers as and duties of a strata corporation, with respect to a matter that relates solely to the section. (But note that the strata corporation also retains its powers and duties in matters of common interest to all the owners.) Specifically, a section may:

- establish its own operating fund and contingency reserve fund;

- set up a budget and require owners to pay strata fees and special levies for expenses it authorizes;
- sustain lawsuits and arbitrations;
- enter into contracts;
- acquire and dispose of land and other property;
- enforce bylaws and rules.

In order to carry out these tasks, a section is required to have an executive, which is effectively a mini strata council.

A section is responsible for expenses of the strata corporation that relate solely to the strata lots in that section. These expenses are shared among strata-lot owners in the section. Strata-lot owners in a section are also subject to the strata corporation's bylaws, budgeting, and governance requirements.

What are types?

Types are the most enigmatic of these three subjects. They can be best understood in comparison with sections.

While the *Strata Property Act* has a dedicated part for sections, the legislation doesn't even mention types once. They are only referred to briefly in the regulations for the act.

There's a clear procedure for creating a section. For types, in contrast, the only thing that's clear is that the type of strata lot must be identified in the strata corporation's bylaws. This raises the question of what can be identified as a type of strata lot. It's necessary to turn to the case law to answer this question. But the cases are few and far between. All they tend to say is that what constitutes a type is a matter for the facts of a given case and that types can't be created by drawing arbitrary distinctions between strata lots.

In practice, types are usually created by reference to different architectural characteristics among strata lots. For example, a strata property made up of townhouses and an apartment building could identify strata lots in the townhouses as one type and strata lots in the apartment building as another type. But the distinctions could be even more fine-grained than this. For example, strata lots with balconies and those without balconies could be different types. Or different types could be strata lots with gas fireplaces and those without. Often, a penthouse strata lot will be iden-

tified as a type. And, finally, some strata corporations identify types based on the use of strata lots: residential and nonresidential, for example.

Unlike sections, types don't have corporate status. This means they can't exercise the kinds of powers or be held to the kinds of duties that accrue to a section. Types don't have an executive, or any semblance of their own governance.

The sole purpose of types is to allow a strata corporation to share costs in a special way. If the cost of a good or service relates to and benefits only one type of strata lot, then the strata corporation's budget may assign responsibility for that cost to the owners of that type of strata lot.

The wrinkle to note here is that this budgetary manoeuvre is only allowed if the cost is paid for out of the strata corporation's operating fund. If the strata corporation has to pay the cost out of its contingency reserve fund or by means of a special levy of owners, then the strata corporation can't allocate it just to owners of the specific type of strata lot.

A simple example illustrates this point. Say a strata corporation's bylaws identified two types of strata lots: townhouse strata lots and apartment strata lots. The cost of regular upkeep and maintenance for the apartment building's elevator could be allocated to apartment strata-lot owners. But when the time comes to replace the elevator, the cost of this job would have to borne by both the apartment strata-lot owners *and* the townhouse strata-lot owners.

What are phases?

Phasing allows an owner-developer to divide a piece of land up into segments and then develop parts of a strata property on each of those segments in a sequence. People in the real-estate industry often use the word *phase* in a loose, colloquial way to describe any planned and staged development. These developments may or may not be what the *Strata Property Act* calls *phased strata plans*. In order to qualify as a phased strata plan, a development must comply with the act's detailed and exacting set of rules.

These rules are complex. Simplifying them allows readers to see that they tackle four issues.

First, they provide for enhanced disclosure and oversight. A phased strata plan won't be accepted for deposit in the land title office unless it's accompanied by a standard form called a Phased Strata Plan Declaration. This declaration must give a

summary of the owner-developer's plans for developing the phased strata property. In it, the owner-developer must disclose information such as the order in which the phases will be developed and the estimated dates for beginning and completing construction of each phase. The Phased Strata Plan Declaration must also be reviewed and approved by a public official called an approving officer before the development can go ahead.

Second, they establish a procedure controlling any proposed departures from the plan of development described in the Phased Strata Plan Declaration. Once the owner-developer has begun to develop a phased strata plan, it no longer has a completely free hand to change course on the project. An owner-developer must get the approving officer's consent to elect not to proceed with a planned phase, or to extend the time in which to decide whether to proceed with a phase.

Third, the rules contain a special regime for the governance of a phased strata property. In this case, the legislation is trying to manage two concerns. First, an owner-developer and strata-lot owners will be in a much longer relationship with one another in a phased strata than they would be in any other kind of strata. Second, phased stratas periodically have new phases, with new owners, coming online. The legislation strives to integrate these new phases as quickly as possible into the existing strata corporation. This is done through a host of measures, such as mandating an early date for the annual general meeting after the deposit of the new phase and setting aside two spots on the strata council for new-phase owners.

Fourth, the act provides some special protections for phase owners' financial interests. The focus of this protection is on what the act calls *common facilities*. This is a term defined to include such major facilities as swimming pools, recreation centres, laundry rooms, and clubhouses. When an owner-developer plans to construct common facilities on a later phase of the strata plan, it must post security to ensure that it sees their construction through. And if the owner-developer builds common facilities in an early phase, then it must make a contribution to the strata corporation's common expenses that are attributable to those common facilities until all phases have been deposited in the land title office.

Why do people use sections, types, or phases?

Legislation on sections, types, and phases primarily has an economic rationale. In the simplest terms, when an owner-developer or a strata corporation decides to employ sections, types, or phases, it's trying to address some concern about money.

Sections and types are, in the main, a response to what might be called the cost-sharing problem. To understand this problem, it's necessary to back up a little bit and describe how strata-lot owners ordinarily share their common expenses.

The strata corporation is responsible for common expenses. To obtain the money needed to pay for these expenses, the strata corporation extracts funds from its members (the strata-lot owners). This is done in one of two ways. One way is by strata fees, which are collected in accordance with the strata corporation's annual budget. Strata fees fund the strata corporation's operating fund (used to pay for expenses that occur once a year or more often) and its contingency reserve fund (used to pay for expenses that occur less than once a year or don't usually occur). The other way the strata corporation obtains funds is by a special levy of owners.

An individual owner's share of a common expense is determined by reference to the unit entitlement for the owner's strata lot. On paper, unit entitlement can be calculated in any way that results in a fair allocation of common expenses. Usually, unit entitlement is calculated by reference to a surveyor's measurement of the size of a strata lot. This is done at the time the strata property is being developed, and a list of unit entitlements for all strata lots is included as a schedule to the strata plan.

The basic rule for sharing costs in a strata property is that strata-lot owners are all in it together. A strata-lot owner must pay strata fees and all special levies in the share determined by the strata lot's unit entitlement.

In the ordinary course, this rule works out rather well. Size of a strata lot is an effective proxy, in most cases, both for consumption of goods and services and for ability to pay.

But some cases put a real strain on the basic rule. For example, a mixed-use strata might require extra trash pickup for its commercial strata lots. Or an all-residential strata property could require natural gas for fireplaces that are only located in half of its strata lots. In these cases, the owners who receive no benefit from the service will likely think it's unfair to have to contribute to paying for it.

An obvious response to this sense of unfairness is to charge owners for these expenses based on usage. But the act makes it extremely hard to implement this kind of solution. If a strata corporation wants to use some basis other than unit entitlement for its common expenses, then it must obtain a resolution of its owners by a unanimous vote. In all but the very smallest stratas, getting every owner to agree to a plan to reallocate expenses is next to impossible.

This is where sections and types come in. They aren't a departure from the basic rule, but they do allow certain strata corporations to blunt its sharp edges. In their individual ways, sections and types allow strata corporations to shift responsibility for common expenses that exclusively benefit only one group of owners onto that group. Within the section or the type, these shifted expenses are still shared by reference to the strata lots' unit entitlements.

Phases aren't directly concerned with cost sharing. Phasing legislation is meant to deal with a different set of money matters.

Phasing legislation allows a greater range of real-estate developers to build large-scale, sophisticated strata properties than would be possible under any other method. Owner-developers are able to tap into a cash flow created by a combination of sales of strata lots in early phases and loans secured against unsold strata lots in those phases to finance construction of the later phases.

Using a phased strata plan gives an owner-developer greater flexibility to respond to changes in market conditions. And phasing has lower transaction costs than any alternative approach, which would probably have to involve cobbling together different strata properties on different parcels of land and using the act's amalgamation procedures to bring them under one strata corporation.

Phasing legislation brings direct benefits for strata-lot purchasers and owners. It increases competition and choice in the marketplace. Phasing also creates economies of scale. Larger strata corporations are able to support a broader and more diverse range of amenities for strata-lot owners.

These advantages for sections, types, and phases also come with corresponding disadvantages. In some ways, sections, types, and phases bolster strata-corporation finances and governance and in others they pose challenges for strata-corporation operation and administration. These problems come out in the three proposals that the committee has highlighted for this summary consultation.

Should the Strata Property Act continue to allow sections?

British Columbia is one of only two jurisdictions in Canada that allow a strata corporation to have sections (Saskatchewan is the other). Sections have been enabled under British Columbia's legislation for over 40 years, and in that time it's become apparent that they cause administrative and operational challenges for many of the stratas that have adopted them.

Before discussing these challenges, it's helpful to get a handle on the advantages conferred by sections. The first and most important benefit has already been touched on: sections give strata corporations tools to deal with cost-sharing issues. Without these tools, it would be much more difficult to operate mixed-use and other complex stratas. Owners in these kinds of stratas would likely fall into protracted disputes over how to spend the strata corporation's money.

The other major advantage of using sections is that they give groups of owners with different interests more control over aspects of the strata's property. For example, in a mixed-use strata, owners of residential and commercial strata lots often have different ideas about things like parking and access. Residential owners tend to value their privacy, while commercial owners need open access and additional parking to support their businesses. Under a strict majority-rules regime it would be difficult for commercial owners to thrive. Setting up a section gives these owners a measure of autonomy. Because a section is a corporation in its own right, it can have and enforce its own bylaws. This gives section owners a level of control that is often necessary to foster a mixed-use strata.

But, ironically, these qualities of sections carry the seeds of problems. The price that strata corporations have to pay for the autonomy of subgroups is the complexity, duplication, and costs that come with having to administer two or more distinct corporations. A strata corporation with a section will have two levels of governance.

At first glance, it might seem that since the sphere of authority of section government is relatively small any costs or complexity will be easily managed. In practice, things don't tend to work out this way. Each section (along with the strata corporation) will have to hold an annual general meeting, prepare and adopt a budget, and elect a section executive and strata council. Because the strata corporation and sections are considered distinct entities (with different interests), strata managers and other professionals dealing with the strata corporation and its sections have to take care to avoid conflicts of interest. If a conflict can't be avoided, then a section or the strata corporation has to find another representative or service provider, at an additional cost.

At this point it might be tempting to conclude that these added complications and costs are simply trade-offs that strata-lot owners knew, or could reasonably be expected to know, would be one of the consequences of creating sections. But this conclusion might miss the mark. In fact, sections are in most cases created by the strata's owner-developer. An owner-developer often has its own motivations for creating sections, or it creates them anticipating the strata property's future needs. If the owner-developer's speculations turn out to be inaccurate, or if circumstances

change, subsequent strata-lot owners may find themselves saddled with the complex realities of sections. And it isn't a simple matter to rid a strata property of sections: it requires the approval of supermajorities within the section and the strata corporation.

This point leads into a broader complaint about sections. The frustrations that arise from the administrative complexity of sections apparently cause many stratas to flout the rules governing sections. While non-compliance shouldn't be excused, if it takes place on a large enough scale it may be a sign of deeper problems. While the concept of corporations within corporations might make sense in theory, in practice this difficult idea can leave people without legal training at a loss. Taking this point a step further, this may be a sign that improving and clarifying the legislation might not be enough to tackle all the problems associated with sections. These problems may exist at a conceptual level, and may point to a fundamental mismatch between the problems that sections are most often adopted to solve (cost sharing, control over facilities) and the tool selected to solve those problems (creating autonomous corporations).

The committee sympathizes with the criticisms of sections. But simply abolishing sections would leave a hole in British Columbia's strata-property law when it comes to addressing cost sharing (particularly allocation of capital expenses) and control of property. Despite considering numerous options, the committee concluded that the benefits of sections outweighed the disadvantages.

Proposal (1) *The Strata Property Act should continue to allow the use of sections.*

agree

disagree

comments: _____

Should the Strata Property Act allow the allocation of capital expenses to types of strata lots?

Expanding the circumstances in which types may be used to share expenses would give strata corporations greater flexibility in structuring their affairs. Strata corporations could embrace a broader form of cost sharing that would come without the administrative complexity that results from creating sections.

Allowing for sharing of capital, in addition to operating, expenses would also support the legislative purpose for types, which involves protecting owners of one type of strata lot from having to pay costs that are exclusively for the benefit of another type of strata lot. Limiting types to operating expenses leaves this legislative goal only partially fulfilled.

Finally, expanding the reach of types would not be a leap into the unknown. It would simply restore the law to where it stood before the advent of the *Strata Property Act*. The long experience with full cost sharing under earlier legislation should help to allay any practice concerns that could crop up from changing the law.

The rationale for the current, limited scope of types appears to be that it fits into a broader system for cost sharing under the *Strata Property Act*. The act's solution for owners who wish to allocate costs more broadly is to establish separate sections, each with an operating fund and a contingency reserve fund.

The comparatively informal nature of types could also cause problems for sharing capital expenses. When this is done with sections, each section is a separate entity from the strata corporation and each has (or should have) its own contingency reserve fund. With types, on the other hand, expenses would be allocated with respect to a single (strata-corporation) contingency reserve fund. There were concerns under the prior act that this approach would result in capital expenses not being properly allocated in practice.

The committee gave serious thought to extending types' cost-sharing rules to capital expenses. This option seemed particularly attractive because it appeared to allow a way to build on the successes of types and tackle some of the shortcomings of sections. If owner-developers and strata corporations were given a way to couple a flexible cost-sharing regime with a streamlined administrative structure they might in the future gravitate toward types and avoid the pitfalls many have found with sections.

But the more the committee discussed proposing this reform, the more it realized that it couldn't simply leave things at that. Other rules, covering financial accountability, administration, and even the beginnings of a governance structure for types, would also have to be contemplated and, in all likelihood, adopted. In the absence of such rules, expanding the scope of types would also, inevitably, expand the scope for abuses involving types—particularly if a type were allowed to have its own contingency reserve fund. But adopting such rules causes another dilemma. Adding these features to types would have the effect of duplicating just those qualities of sections

that have caused such administrative trouble. It would be more than ironic if reforms ended up remaking types into an echo of sections.

***Proposal (2)** The Strata Property Act should continue not to allow the allocation of capital expenses to types of strata lots.*

agree

disagree

comments: _____

Should special new-phase requirements for interim budgets, expedited annual general meetings, and setting aside places on strata council be amended?

Phases pose some thorny problems for strata-corporation governance. Here, the committee spotlights issues that arise when a new phase is added to a strata corporation that has already had one or more phases come into being.

When a new phase is deposited in the land title office this act gives rise to a strata corporation. By virtue of the act, that new-phase strata corporation is instantaneously amalgamated with the strata corporation that was created by the deposit of the first phase.

The act's goal is to integrate this new phase into the existing strata corporation as quickly as possible. Fulfilling this goal has some wide-ranging consequences, three of which are the subjects of this issue.

The first concerns budgets. Immediately after a new phase is deposited, title to all its strata lots vests in the owner-developer. The owner-developer is solely responsible for the phase's expenses for so long as it holds title to all the strata lots.

Once a strata lot is sold to a purchaser, the phase enters a transitional period for its finances. This transitional period is governed by a document called an interim budget. The owner-developer itself prepares and adopts the interim budget.

This interim budget doesn't just apply to the new phase. It covers the whole strata corporation. If that strata corporation already has an existing budget, then it is re-

placed by the interim budget. In these cases, the owner-developer is directed to base its interim budget on the strata corporation's budget.

Then, after this budgetary change, the act calls for an annual general meeting of the strata corporation to be held on an accelerated timetable. The annual general meeting must be held during a six-week period after a threshold is passed, the threshold being either the sale of 50 percent plus one of the strata lots to purchasers or the date that is six months after deposit of the new phase, whichever comes first. A new budget for the strata corporation is adopted at that annual general meeting.

Finally, also at that annual general meeting, a new strata council is elected. The strata corporation must grant two extra places on this council for owners in the new phase. This rule overrides any provisions in the bylaws limiting the size of council. If that addition of new council members would cause the strata council to exceed the bylaw limit, then it is allowed to do so until the next annual general meeting.

These rules help to ensure that the new phase is rapidly integrated into the strata corporation. The expansive interim budget places revenue and expenses for the strata corporation and the new phase on the same footing. They are ultimately resolved in a new strata-corporation budget, which is approved at an expedited annual general meeting. And the new strata council elected at that meeting guarantees new-phase representation, which means that critical matters for the new phase, such as warranties, will have the attention of the strata corporation's government.

The downside with each of these rules is that they have the potential to interfere with the existing strata corporation's administration.

Allowing an owner-developer to impose an interim budget on a strata corporation that has already approved its own budget represents a real erosion of democracy in that strata corporation. The only safeguard provided for those democratic interests is the requirement that the interim budget be based on the strata corporation budget. But "based on" is a lax standard. It gives the owner-developer significant leeway to force its own views on expenses on a fully fledged strata corporation. This may upset the strata-corporation's own funding models for its plans. Further, it's unlikely that many owner-developers relish this power, as it's liable to exacerbate any existing disputes between the owner-developer and strata-lot owners.

While expediting the strata corporation's annual general meeting helps to deal with budgetary concerns, it also creates its own set of administrative headaches. This requirement turns the name of the meeting into a misnomer. Depending on the number of new phases that are deposited, a strata corporation might be called on to have

Consultation Paper on Complex Stratas

two, three, four, or more “annual” general meetings in a calendar year. This is sure to spread confusion among the ownership. The status of any rules adopted by the strata council may be cast in doubt if they aren’t ratified at the appropriate annual general meeting. This requirement also multiplies costs for the strata corporation, as multiple budgets and meeting packages have to be prepared and distributed.

Finally, additional annual general meetings result in additional strata-council elections, with the council growing by two new members for every phase deposited during the year. If there is a high number of new phases, then the result could be a large and unwieldy strata council, dominated by owners who are new to the strata property.

In the committee’s view, these administrative problems can be addressed by slowing down the integration of a new phase. The interim budget should only apply to the strata lots in the new phase. This change relieves some of the pressure to hold an early annual general meeting. That pressure can be eliminated by repealing the requirement to elect additional strata council members. This change would remove the guarantee that new-phase owners be represented on the strata council. But it wouldn’t mean that their interests could be disregarded. In serious cases, the new-phase owners could requisition a special general meeting. Maintaining the established annual meeting schedule simplifies and streamlines administration of the broader strata corporation.

There are trade-offs involved in the committee’s approach. But the committee believes that it would result in a more workable way to administer phases.

Proposal (3) *The Strata Property Act and its regulation should be amended as follows in respect of a phase deposited after the first phase in a phased strata plan:*

- (a) the interim budget that must be prepared by the owner-developer will apply only to that new phase;*
- (b) the requirement to hold an expedited annual general meeting will be repealed; and*
- (c) the requirement to set aside two places on the strata council for new-phase owners will be repealed.*

agree

disagree

comments: _____

Conclusion

The committee is interested in your thoughts on these proposals. And if you wish to pursue any of the ideas raised in this summary consultation in greater detail or depth, the committee encourages you to read and respond to the full consultation paper. Responses to the full and summary consultations received before **15 January 2017** will be taken into account in preparing the final report on complex stratas, which BCLI plans to publish in 2017.

APPENDIX C

Biographies of Project-Committee Members

Patrick Williams is a partner of the Vancouver law firm Clark Wilson LLP and a member of the firm's Strata Property Group. He is also a member of the Alternative Dispute Resolution Practice Group. Patrick's practice focusses on assisting strata corporations, developers, and strata-lot owners with dispute resolution. He is an experienced and qualified arbitrator and mediator who has managed numerous strata-property, real-estate, and construction disputes.

Patrick has written and published many articles on issues impacting the strata-property industry, including construction-related problems experienced by owners, property managers, and developers. He is a regular contributor to industry periodicals and regularly delivers presentations and seminars to industry groups, strata corporations, and property managers. He has also published articles regarding the use and benefit of arbitration and mediation as an alternative to court and is a frequent guest instructor for the mediation component of the Professional Legal Training Course required to be taken by all articulated students in British Columbia.

Patrick received his dispute resolution training through the Continuing Legal Education Society of British Columbia and the British Columbia Arbitration and Mediation Institute. He obtained his Bachelor of Commerce degree in 1973 and his Bachelor of Laws degree in 1974, from the University of British Columbia.

Veronica Barlee (committee member July 2014–present) is a senior policy advisor with the provincial government's Office of Housing and Construction Standards. For the past seven years, Veronica has worked on strata legislation, regulations, policies, and issues. Strata housing is a vital economic driver and a key housing choice in British Columbia, providing almost 25% of the province's housing stock. Veronica's professional background includes extensive policy-development and management experience in the private, public, and not-for-profit sectors, including small business, fundraising, forest-fire fighting, and community services. Her MBA from the University of Alberta is augmented by ongoing professional development in policy development, stakeholder consultation, public engagement, and information management.

Larry Buttress (committee member October 2013–June 2016) was first licensed under the *Real Estate Act* in British Columbia in 1980. Working for his family's small, independent real-estate company, he sold residential and multi-family real estate, assisted in the company's property-management portfolio, and achieved his agent's qualifications in 1982. That same year he began working with the Real Estate Board of Greater Vancouver as the manager of its Multiple Listing Service. In 1986, he earned his Diploma in Urban Land Economics and became a member of the Real Estate Institute of British Columbia and the Real Estate Institute of Canada. In 1988, he was appointed as REBGV's executive officer, a position he held until 1995. In 1995, he joined JCI Technologies Inc. as director of real-estate services. He successfully negotiated that company's preferred supplier agreement with the Canadian Real Estate Association that led to the development of mls.ca, now REALTOR.ca, the largest and most frequently visited real-estate website in Canada.

Larry joined staff at the Real Estate Council of British Columbia in 1998 as its manager, industry practice. He has been an active participant in the Canadian Regulators Group as chair of its Internet Advertising Guidelines Task Force, chair of its Electronic Transactions Task Force, and vice-chair of its Agency Task Force. In 2003–04, Larry also served as the district vice-president of the Canadian District of ARELLO, the Association of Real Estate Licence Law Officials. Larry recently retired as the deputy executive officer of the Real Estate Council of British Columbia.

J. Garth Cambrey has over 28 years of experience in the property-management industry in British Columbia. Garth currently sits on the Real Estate Council of British Columbia, was the founding director and past vice-president of Strata Property Agents of BC and was a past director and vice-president of the Professional Association of Managing Agents (PAMA). He is an active member of the Real Estate Institute of British Columbia and is involved with various industry associations and committees. Garth has been appointed by the Supreme Court of British Columbia as an administrator under the *Strata Property Act* on 17 occasions and holds a Chartered Arbitrator designation with the ADR Institute of Canada, acting as an arbitrator in strata disputes. Garth is also involved in various advisory groups with the British Columbia government, providing support and advice with respect to provincial legislation, including the *Civil Resolutions Tribunal Act*.

Tony Gioventu is the executive director of the Condominium Home Owners Association of British Columbia (CHOA), a consumer association in British Columbia with over 200 000 members comprising strata corporations, owners, and business members who serve the strata industry. Tony is the weekly Condo Smarts columnist for *The Province*, *The Times Colonist*, and *24 Hours Vancouver*. Since 2002, Tony has written over 1000 columns and information bulletins dedicated to strata living and

is the co-author of *A Practical Guide to Bylaws: The Strata Property Act*, and *Understanding Governance: Strata Rules of order and procedures in British Columbia*. Tony has served as a director/committee member for the Homeowner Protection Office, BC Building Envelope Council, Canadian Standards Association, the Real Estate Council of British Columbia, and continues to play an active role in research and development of building standards, legislation for strata corporations, and consumer protection.

With offices in New Westminster, Victoria, and Kelowna, CHOA provides service to its members throughout the province, promoting an understanding of strata living, and the interests of strata property owners. On average the association fields 300 inquiries a day from owners, strata council members, managers and agents, and delivers over 100 seminars annually on a variety of strata related topics including governance, operations, and administration.

Tim Jowett started with the Vancouver land title office in 1988 and has progressed through the years from an examiner of title into his current position of senior manager, E-business and deputy registrar with the New Westminster land title office at the Land Title and Survey Authority of British Columbia.

Tim currently oversees the E-business team, a group of specialist examiners who are responsible for the published practices, statutory procedures and functionality related to the electronic filing system. The team's work involves various enhancements, changes, and updates to the systems and processes that are being done in an effort to support the needs of stakeholders.

His role also entails answering questions from a variety of stakeholders, primarily lawyers, notaries, land surveyors, and employees with local governments. Tim has presented and is a key participant at various meetings and conferences on land-title issues with these stakeholders.

Alex Longson (committee member July 2016–present) started his career in real estate in 2005, shortly after emigrating from the United Kingdom, where he had 20 years' experience in the automotive-engineering industry working as a test engineer for Ford Motor Company. He became licensed for strata management in 2006 with a brokerage in the Okanagan, and subsequently became licensed for rental management and as a managing broker in 2009. In 2012, he joined the staff of the Real Estate Council of British Columbia and in his role as senior compliance officer he investigates complaints, advises and educates licensees on the requirements of the legislation, and supports the real estate council's Strata Management Advisory Group. He has also been a guest speaker to the Strata Property Agents of British Columbia and

the British Columbia Real Estate Association, and is currently a resource to the Real Estate Council of Alberta for the Condominium Managers Implementation Advisory Committee.

Judith Matheson started her career in real estate in 1980. She is currently a real-estate agent with Coldwell Banker Premier Realty. Judith has sold thousands of strata properties as resales, as well as having worked for many of the top strata developers in British Columbia. She is ranked in the top seven percent of realtors worldwide with Coldwell Banker, and is a Coldwell Banker Premier Realty Top Producer.

Judith is a member of the Real Estate Board of Greater Vancouver and the Canadian Real Estate Association, and is licensed with the Real Estate Council of British Columbia. She is an MLS Medallion Club Member, Real Estate Board of Greater Vancouver Quarter Century Club Member, and an Affiliate Member of LuxuryHomes.com. Judith has been awarded the Coldwell Banker Ultimate Service Award, the Coldwell Banker Presidents Circle, the Coldwell Banker Diamond Society, the Coldwell Banker Sterling Society, and the Coldwell Banker Top 50 in Western Canada.

Elaine McCormack is a founding member of the law firm Wilson McCormack Law Group. For over 20 years she has assisted strata corporations, individual owners, and management companies in the governance and dispute-resolution processes of strata life. She prepares bylaws and privacy policies, resolutions, and contracts. She has also represented clients in court and in human-rights matters.

Elaine is actively involved in educating members of the strata community. She frequently designs and delivers seminars for the Professional Association of Managing Agents and presently serves on the education committee of PAMA. She has written and delivered the latest full-day course entitled “Real Estate E & O Insurance Legal Update for Strata Managers” used for the Relicensing Education Program for strata managers. She also frequently delivers seminars for the Condominium Home Owners’ Association of British Columbia and has written many articles for the CHOA News. She is a past director of the British Columbia Arbitration and Mediation Institute (BCAMI) and currently sits on the accreditation committee of BCAMI for the QArb designation.

As a Charter Arbitrator, Elaine frequently adjudicates disputes and uses this experience in turn when advocating for clients before fellow arbitrators. She is a member of the MediateBC Civil Roster and has received mediation training through the British Columbia Justice Institute, the Continuing Legal Education Society of British Columbia, and MediateBC. Elaine has also been counsel in several seminal Supreme Court of British Columbia decisions involving such diverse strata issues as the en-

forcement and validity of age bylaws and rental bylaws, the transitional provisions between the *Condominium Act* and the *Strata Property Act* with respect to allocation of repair costs, and claiming damages for improperly calculated strata fees.

Elaine's degrees and designations include a BA with a major in English, minor in Law and the Liberal Arts from the University of Calgary in 1988, an LLB from the University of British Columbia, and a CARb designation from the ADR Institute of Canada Inc. in 1998.

Doug Page (committee member October 2013–July 2014) is the manager of housing policy in the British Columbia government's Office of Housing and Construction Standards and is a former condo owner. British Columbia's strata legislation and regulations are now one of his main responsibilities. He has worked for 25 years in various aspects of the housing field, including stints with the Urban Institute in Washington, DC, the US Department of Housing and Urban Development, BC's Treasury Board staff, and with a large private developer and manager of apartment buildings. Doug has a BA from Dartmouth College and an MA in urban geography and a diploma in urban land economics, both from the University of British Columbia. He is a member of the Real Estate Institute of British Columbia.

David Parkin is the assistant city surveyor for the City of Vancouver. He has been working in the land surveying profession for over 30 years in different capacities in Whistler and the Vancouver Lower Mainland. He obtained his Bachelor of Science in Surveying Engineering from the University of Calgary in 1992 and was commissioned as a British Columbia Land Surveyor in 1995. He is a practising member of the Association of British Columbia Land Surveyors.

David was employed by Underhill Geomatics Ltd. for 15 years and worked as a project land surveyor and was responsible for managing and supervising the day-to-day operations and projects of the Vancouver office. His preferred areas of practice while with Underhill's were larger development projects that included the preparation of air-space subdivisions and strata plans.

In his current capacity as the assistant city surveyor, David reviews conventional and air-space subdivision applications, subdivisions of existing strata plans and statutory right of way plans, and agreements related to commercial and residential developments.

Allen Regan is the vice president and managing broker for Bayside Property Services Ltd. He has been with Bayside since April 1999. Bayside provides management services to approximately 145 strata corporations throughout the lower mainland,

as well as approximately 40 rental-apartment buildings. In total, Bayside manages about 12 000 strata and rental units. Prior to working at Bayside, Allen held positions in the commercial real-estate field with GWL Realty Advisors as regional director for British Columbia and with O & Y Enterprise as general manager for British Columbia. Allen has a B Comm from the University of British Columbia in urban land economics (1979) and is licensed in British Columbia for trading, rental, and strata management, all as a managing broker. Allen is also on the board of directors of the Strata Property Agents of British Columbia.

Stan Rule is a partner at the Kelowna law firm of Sabey Rule LLP. He has been practicing in Kelowna since shortly after he was called to the bar in 1989. His preferred areas of practice are wills, trusts, estates, and estate litigation.

Stan writes a legal blog entitled “Rule of Law.” He has been a guest speaker at the Trial Lawyers Association of British Columbia, the Canadian Bar Association Okanagan wills and trusts and the Victoria wills and trusts subsections, the Okanagan family law subsection, the Kelowna Estate Planning Society, the Vernon Estate Planning Society, and he has presented papers at eight continuing legal education courses.

Stan is a director of the British Columbia Law Institute. He is the treasurer of the national wills and estates subsection of the Canadian Bar Association. He is a member and former chair of the Okanagan wills and trusts subsection, and a member and a former president of the Kelowna Estate Planning Society. He is also a member of the Society of Trust and Estate Practitioners. He recently participated as a member of the British Columbia Law Institute Project Committee on Recommended Practices for Wills Practitioners Relating to Potential Undue Influence.

Sandy Wagner represents strata owners in many areas of public concern as president of the board of directors of the Vancouver Island Strata Owners Association. VISOA’s mandate is education, empowerment, and assistance for British Columbia strata owners, and has provided front-line service to them for over 40 years.

She has been a director of VISOA since 2007 and has led the association for the past six years, during which time it has grown significantly both in membership and in visibility. Sandy currently edits the VISOA Bulletin, a quarterly newsmagazine distributed to nearly 10 000 VISOA members, and leads VISOA’s workshop group, providing educational full day workshops on strata best practices. She is also part of the Civil Resolution Tribunal staff, having recently joined the team as a Resolution Support Clerk.

Consultation Paper on Complex Stratas

As part of her involvement on behalf of strata owners, Sandy was a member of the Civil Resolution Tribunal Working Group (a committee working on procedural matters for the CRT) and is currently a volunteer on the Strata Management Advisory Group (working with the Real Estate Council of British Columbia to provide education and information for strata managers).

Ed Wilson is a partner with the Vancouver law firm Lawson Lundell LLP and has practiced in the real-estate and municipal-law fields, with a specialty in real-estate development, for over 30 years. Ed was a member of the Canadian Bar Association's strata property committee that worked with government in developing the current *Strata Property Act*. Ed has been actively involved with the Continuing Legal Education Society of British Columbia. He has taught more than 15 CLEBC courses, including courses on strata-property law, resort development, real-estate development, and depreciation reports for strata corporations. Ed is also a member of the Urban Development Institute's legal issues committee.

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- Association of British Columbia Land Surveyors
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- Condominium Home Owners Association
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