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May 13, 2003

Mr. John Dzenekoj
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Dear Sirs/Mesdames:

Re: Freehold (Lot-Line) Condominiums

Enclosed you will find an article that I have written in respect of the so-called Freehold or Lot-Line condominiums. It attempts to address many of the, often confusing, issues relating to the administration and management of these types of condominiums. Please feel free to distribute it to your managers. If you have any questions, the writer would be pleased to discuss them with you in more detail and perhaps attend a Manager's meeting to answer questions.

Yours very truly,

SIMPSON WIGLE LLP



Ronald S. Danks

RSD/eag
Encl.

THE CONDOMINIUM ACT 1998
FREEHOLD (LOT-LINE) CONDOMINIUMS

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In a typical condominium, predominantly townhouse and bungalow style, the boundaries of the unit end with the drywall on the interior walls and ceilings of the unit and the surface of the concrete basement slab. The boundaries will end at the interior surface of windows and doors in a closed position. However, many developers have in the past, and continue, to construct condominiums where those boundaries have been pushed outwards. In some cases, the boundaries may extend to the outside face of exterior walls and roof system. In others, the boundaries may be pushed far enough out to encompass a front yard/driveway and rear yard area. These are sometimes referred to as "freehold" or "lot-line" condominiums.

Marketing Term:

In some cases, these condominiums are created to suit a specific project, such as detached homes surrounding a golf course, the intent being to give the homeowner much greater freedom in respect of landscaping or other exterior additions. However, in the majority of situations, the creation of this type of condominium is largely due to marketing on the part of the builder. Some of that marketing involves intimating that the homeowner would have more freedom when it came time to dealing with the exterior of their own home since they owned it, as opposed to it being part of the common elements, (this is often very misleading - see notes below). Principally, the marketing scheme behind this type of condominium promotes the low maintenance fees typically charged in these situations. By removing all of the major capital items of the common elements from the condominium's responsibility (roofs, windows, landscaping, etc.), a condominium corporation's actual expenses for common element maintenance and repair and long-term reserve planning is minimal resulting in what appear to be very low common expenses. What many purchasers fail to recognize is that when it does come time to replace their windows, roof, or other part of the unit, their costs can be substantially higher per unit than it would have been if it had been done through the bulk buying power of the condominium.

No Two Alike:

No two freehold or lot-line condominium corporations are the same, other than those that may be built by the same developer in a phased development. Neither is the concept a new one. The author is aware of several condominium corporations that were built in the late 1960s and early 1970s that were created using this "freehold" concept although they weren't marketed as such at that time. There is often a great deal of confusion amongst homeowners, board members and in some cases, property managers, as to how these projects are administered, what obligations they have or do not have in comparison to

other normal condominiums, and what is the division of responsibility for maintenance, repair and insurance and replacement of common elements and unit components as well as responsibilities regarding the insuring of units and common elements. Before proceeding with a more detailed discussion of freehold v. typical condominium issues, we have in the following point form notes outlined some of those basic considerations that are sometimes misinterpreted:

- **The Condominium Act, 1998:**

Regardless of whether a condominium project is built as a freehold, lot-line or a typical condominium, they are all governed by the provisions of the *Condominium Act, 1998* - there are no exceptions;

- **Declaration/By-Laws/Rules:**

Board members and owners in a freehold or lot-line condominium are still governed by the Declaration, By-Laws and Rules for the corporation which in many respects would be very similar to those of other more typical condominium corporations;

- **Insurance:**

The Condominium Act does not differentiate between a so-called freehold condominium or a typical condominium in respect of insurance requirements. Therefore, a freehold or lot-line condominium corporation must still maintain insurance over the common elements and units. Owners must maintain their own insurance for their unit, betterments and improvements, and contents as well as personal liability. Owners of these types of condominiums should be aware that those policies must contemplate any improvements or betterments that are made to the exterior of the unit by the homeowner after original construction is completed. These would normally be excluded from the corporation's general insurance policy. The homeowner's liability insurance must also extend to the front and rear yards, driveways, patios and sidewalks, if those areas are located within the unit boundary. As an example, in the event of a major fire, the corporation's policy would respond to rebuilt the structure of the unit as well as its original internal components, (floors, dividing walls, kitchen cabinetry, bathroom fixtures, etc.), subject to any limitations that may be placed by the passage of a "standard unit bylaw. The homeowner's policy would respond for the usual betterments and improvements which could include external improvements such as the addition of a deck, skylights, awnings, fencing, additional landscaping features and any other improvement that the owner makes within the unit boundaries;

- **Reserve Fund:**

Just like any other condominium corporation, a freehold or lot-line condominium must maintain a separate reserve fund account in the corporation's name. That

reserve fund, however, would only be used to fund major common element repairs and maintenance which in most lot-line condominiums may only include roads, street lightings, underground sewer and water services, common landscaped areas and other amenities that are not located within the unit boundaries. Such reserve funds cannot be used to pay for the replacement of roofs, windows, doors, exterior cladding, etc., which form part of the unit unless the Declaration places some obligation to maintain and repair these areas on the Corporation, (see notes below).

- **Enforcement Proceedings:**

Just like in any condominium, should an owner breach a Rule or a Declaration provision, the Act affords the corporation the same rights to enforce compliance with these provisions as in any other condominium. This would include mandatory mediation and arbitration, where applicable, and the compliance order remedy.

- **Common Expenses:**

Owners of freehold or lot-line condominiums are equally obligated to contribute towards the common expenses and reserves as their counterparts would be in any other typical condominium corporation. The condominium corporation has the same rights to enforce payment of common expenses, such as the notice of lien procedure as it would have for any other corporation.

- **Audit:**

Just as in any other corporation, freehold and lot-line condominiums must obtain annual audits of their financial statements. The standard exception would be a site with less than 25 units where all of the owners as of the date of the AGM, agree in writing that the audit is to be waived for this particular year.

Reserve Funds:

In many cases, owners who buy into freehold or lot-line condominiums are not aware of what they are actually purchasing. In the extreme cases, owners believe they are buying a typical condominium only to find later, (in some cases many years later), the real status of their condominium corporation. The author has come across condominium corporations that have operated for decades on the mistaken belief that they are a typical condominium when in fact they were originally created as a freehold or a lot-line condominium. In some cases, this has led to the creation of extremely large reserve funds on the belief that the replacement or major repair of what were thought to be common element components, such as roof systems, windows, doors, etc., would be paid out of the reserves. In fact, the condominium cannot use funds from the reserves to pay for "unit" repairs. Often this type of thing occurs in self-managed condominiums and does not come to light until a corporation obtains professional property management.

Use Restrictions:

As indicated above, most of these type of condominium corporations will still have use restrictions in respect of the units, both in the Declaration and the Rules. Well thought out Declarations for freehold condominiums will, for example, contain provisions which prohibit owners from making external changes of any kind without the consent in writing of the Board of Directors. Some will go on to set out protocols that the Board must follow before giving its consent, for example, ensuring that the improvement will not detract from the appearance of the overall project, interfere with other units, or damage the common elements. Other Declarations may contain restrictive provisions relating only to specific parts of the unit; a typical one being that even though the roof system is part of the unit, the corporation will determine when the replacement of the roof is necessary and will then control that process by choosing the contractor, the materials to be used and perhaps the colour of the shingling. This type of specific control might extend to other parts of the common elements such as the replacement of window systems after general failure, (i.e. they have worn out), or exterior cladding. Generally speaking, owners will remain responsible for making small repairs and carry out maintenance due to normal wear and tear or for damage that is not of an insurable nature.

Freehold condominiums will generally have very similar Rules to other condominium corporations. As an example, freehold condominium unit owners may be prohibited from installing satellite dishes on the exterior of their unit even though the roof and the external walls belong to them.

Key Areas to Review:

The only way to fully understand a freehold or lot line condominium is to read the Declaration, By-Laws and Rules in their entirety. Managers and Boards of Directors should be looking specifically at certain key provisions including:

- **Description:**

Schedule "C" to the Declaration which sets out the legal description of the boundaries of the units. This review should also include a review of the Description Plans to understand where the physical boundaries of the units end.

- **Maintenance and Repair:**

Provisions relating to the allocation of maintenance and repair responsibilities within the Declaration should be reviewed carefully to ensure that there is a full and complete understanding of where the responsibility of the corporation ends and the homeowners' starts. An example may be a lot line condominium unit where the main water line supplying the unit bursts. If the break in the water line is located within the boundaries of the unit, it could very well be the homeowners' responsibility to have it repaired at the owner's own expense.

- **Specific Restrictions:**

Some corporations' Declarations may contain a very specific restriction on the use of units which would include the external structure for freehold and lot-line condominiums. An example, may be an absolute prohibition of the installation of satellite dishes on the exterior of a units.

- **Insurance:**

The insurance coverage for the Corporation should be reviewed to make sure that it is adequate to protect both the common elements and units. Some freehold and lot line corporation boards mistakenly believe that they do not have to insure the units since the structure belongs to the homeowner. This could have disastrous effects if a major claim was made under the policy and there was insufficient insurance to cover the repairs. The result could be significant payments out of the reserves and/or special assessments to the owners.

- **Rules:**

The Rules should be examined in their entirety as they may contain provisions in addition to the Declaration which restrict the ability of owners to make improvements or carry out other activities within their unit boundaries.

- **Improvements:**

It should be noted that improvements to a "unit" do not require compliance with Sections 97 and 98 of the Condominium Act. As such, the entering into of a Section 98 Agreement and having it registered on title is not mandatory. Notwithstanding the foregoing, it is the writer's recommendation that some form of written agreement be used to document unit owner made improvements to common element areas where the consent of the Board is required for those improvements. Those agreements should contain many of the same provisions as what we find in a Section 98 Agreement, such as:

- a description of the improvement and its location;
- an acknowledgement that the owner is responsibility for the cost of the installation of the improvement, its future maintenance, repair and replacement and for insuring it;
- where appropriate, a reservation of a right to the corporation to require the temporary removal of the betterment where it might be necessary in order for the Corporation to carry out its duties and obligations. As an example, where the Declaration makes it the responsibility of the Board of Directors to organize roof replacements, the consent to install a satellite dish should

include a statement that when and if the roof is to be replaced, the homeowner must remove the satellite dish until the replacement has been completed;

- the agreement should be stated to be binding upon future owners of that unit and, since the document is not registered, a statement that new owners will be required to sign a new agreement or acknowledge compliance with the existing one, failing which the consent may be revoked.

Such agreements should be treated in much the same fashion as a Section 98 Agreement in that they should be included in the unit file and a copy issued to any new buyer or mortgagee of that unit when a Status Certificate is issued for it.

Paragraph 19 of the Status Certificate which relates to the existence of Section 97/98 Agreements should be modified to indicate that while there is no Section 98 Agreement in force, there is this general agreement governing consent in making betterments or improvements to the unit itself, with a copy enclosed. While it would be good practice to require such agreements for any improvement or betterment, it may, on a more practical basis, not be absolutely necessary for those of a very minor nature.

Where a corporation routinely provides consents for a minor improvements, it might be better to try to incorporate provisions into the Corporation's Rules to address them. As an example, the corporation would likely have a rule which prohibited the improvements or alterations to the exterior of the unit without the consent of the Board. That Rule could be modified to indicate that there were exceptions which could then be listed, along with any specific policies or other requirements of the Board, for example, the colour of a storm door or the requirement to use a certain type of material when making the improvement. That Rule should indicate that any such improvements made by the homeowner now or in the future, would remain their responsibility to maintain, repair, insure, replace, as well as indicating that the corporation might require them to remove temporarily should it be necessary for the corporation to carry out its obligations under the Act. While not perfect, the latter would put future owners on notice of these requirements, notwithstanding that specific agreements may not be in place in respect of the unit that they were purchasing.

Vacant Land Condominiums:

As a final note, this paper was made in respect of the so-called freehold or lot-line condominiums that were capable of being created under the old Condominium Act as well as the current. The comments herein do not necessarily relate to "Vacant Land" condominiums which we are only now seeing being developed. There are different considerations in respect of vacant land condominiums that are not addressed in this paper, such as the requirement that unit owners must insure any buildings that are constructed on a vacant land condominium "unit". However, many of the points made,

would apply equally to a vacant land condominium as to a so called freehold or lot-line condominium.

Summary:

In summary, it would be our strong recommendation that a Board member or manager who finds themselves administering a freehold or lot-line condominium, become familiar with the contents of the corporation's Declaration, Description Plans, By-Laws and Rules. Administrative issues relating to lot line and freehold condominiums can be much more complex than in a typical condominium development. As such, Board members and managers should not hesitate to refer specific questions or concerns to their corporation's legal counsel for interpretation and for advice.

Ronald S. Danks, B.A. (Hons.), A.C.C.I, F.C.C.I., is a partner with the Hamilton and Burlington business law firm of Simpson Wigle LLP. Ron's practice is restricted to the field of condominium law and administration, as well as cooperative housing ventures. Ron currently acts as general counsel to over 450 condominium corporations and housing co-operatives throughout Southern Ontario. He is the current Chair of the National Board of Directors of the Canadian Condominium Institute, and is the immediate past-President of the Golden Horseshoe Chapter of the Canadian Condominium Institute. He is an associate member of the Association of Condominium Managers of Ontario, as well as a professional member of the Community Association Institute of the United States of America.

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