

Severance of Phased Strata Plan Lands: Strata Beware!

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A phased development may be put on hold due to market conditions. The development could be delayed for years. When the time to proceed arrives, the developer may wish to develop a different project to take advantage of a market conditions. This allows the developer to take advantage of the highest and best use for the remainder lands and to maximize profit. Rather than proceed with the phased development, the developer elects to sever the remainder lands (undeveloped phases) from the phased strata plan and develop these lands independent of the strata. This is a common occurrence that raises complex questions.

For example, the developer obtained approval in 1995 to construct a 100 unit 4 storey apartment complex over 2 phases. The first half of the building comprising 50 units was constructed in Phase I. The remaining 50 units were to be constructed on the phase II remainder lands. The drawings envision that the Phase II building will attach to the northerly exterior wall of the Phase I building located on the boundary line between Phase I and the Remainder Lands. Upon completion there would be a single 100 unit building. Phase 1 was built; however, Phase II did not proceed.

In 2005 (a decade later), a court order approved the severance of the remainder lands from the phased strata plan with the consent of the strata corporation and the approving officer. The remainder lands were sold to a new developer who is in the process of developing the remainder lands as a rental project. It is not being developed as part of the strata corporation. The aesthetics, density and use are substantially different as compared with the approved project in 1995.

Several years after court ordered severance, the strata corporation received professional advice confirming that the northerly wall of the Phase I building was constructed as an interior wall. This makes sense since the Phase II structure was intended to connect to the Phase I building and form 1 continuous structure. The northerly wall and parkade of the strata corporation building encroach onto the remainder lands.

The strata corporation must remediate the northerly wall to meet exterior wall standards. This work will increase the width of the wall. The encroachment will increase by several inches post remediation onto the remainder lands. In order to conduct necessary remedial work to the northerly wall, the Strata Corporation requires access to the remainder lands.

A review of the strata documents reveals that an encroachment agreement and access easement do not exist. The municipality and the approving officer refuse to get involved on grounds that these are private agreements between adjacent land owners.

The current owner of the remainder lands denies access and could demand that the encroachment be removed. The cost to move an entire wall and parkade to within the strata lot lines and bring the wall up to building code standards is viewed as prohibitive. The strata corporation and its owners are severely prejudiced and seek an appropriate remedy.

The question is how can you force an adjacent land owner to provide agreements in the absence of any legal obligation to do so? Is there any legal obligation on the municipality or the approving officer to remedy these serious omissions? It may be too late.

The limitation period against the municipality and approving officer under the *Local Government Act* is short - 60 days' notice after the claim is discovered and 6 months to start the action in the Supreme Court.

There will be questions regarding whether the limitation period, including the ultimate limitation period (now 15 years), has expired. The strata corporation may require approval of emergency legal expenditures pending a general meeting of owners. The result of legal action alleging that the municipality and approving officer failed to put proper agreements in place during the subdivision or the severance process is uncertain and may be cost prohibitive.

What should the strata corporation do? The best course of action is to take steps to prevent the problem from occurring in the first place by seeking appropriate advice at the time of the proposed severance or upon turnover from a developer.

Sections 235(1) and (2) of the *Strata Property Act* (the "Act") permit a developer to elect *not* to proceed with a phasing plan.

Prior to the election date set out in the Phased Strata Plan Declaration, the developer must give notice of the election not to proceed to the Strata Corporation and to the approving officer and file with the registrar a notice of the election not to proceed, together with a reference plan of the remainder parcel. On receiving this notice, the registrar will remove the Phased Strata Plan Declaration notation from title to the strata lots and from title to the remainder parcel.

A separate development of remainder lands depends on the Phased Strata Plan Declaration and the set-up of the project. If a phase can stand alone as a separate development under applicable zoning and appropriate easements exist for access, parking or other purposes, then the separate development may not be problematic. However, if necessary encroachment agreements and easements are not in place, then it may be difficult to negotiate them post severance.

Section 232 of the *Act* permits a developer to amend a Phased Strata Plan Declaration to extend the time for making an election to proceed with the next phase. It must apply to the approving officer for an amendment extending the time to make this decision. The Land Title Office requires a court order to amend the Phased

Strata Plan Declaration if the original date has expired (s. 231), the date has already been extended once (s. 232) or the request is for more than one year (s. 232).

Under s. 234 of the *Act*, the developer must give the strata corporation written notice of its application to the approving officer to amend the Phased Strata Plan Declaration. Thereafter, the strata corporation has 30 days to make written representations to the approving officer.

At this stage the Strata Corporation should immediately seek legal assistance for an opinion regarding whether there are any constraints associated with severance of the remainder lands in the Phased Strata Plan. This opinion should be comprehensive and include a full review of the development including disclosure statements, proposed facilities, proposed changes to the Phased Strata Plan, engineering reports, easements, agreements and other documents to determine the constraints associated with severance. This review could cost thousands of dollars and should include input from an architect or engineer.

Section 234(3) permits the strata corporation to waive this notice requirement. The approving officer cannot provide the amended declaration until this 30 day period has passed. Also, the approving officer has discretion to approve an amendment to the declaration with or without changes or to refuse the extension or amendment. The focus in the *Act* is on common facilities.

If a court order is required, it will likely be very difficult for the developer to change the Phased Strata Plan and extend dates if the strata corporation opposes the application on reasonable grounds. Reasonable grounds could include prejudice to the strata corporation from the absence of an easement for the encroachment agreement and access for repairs.

If the application proceeds to court, the developer must provide full disclosure to the Court regarding the status of the development, future intentions, disputes, deficiencies and other constraints that could impact the strata corporation.

The strata corporation should address the best interests of the owners at this stage. It should review the impact on marketability if future phases are not constructed

and address any requirement for easements, encroachment agreements and other agreements. Is the developer prepared to provide benefits in exchange for consent? The benefits could include agreements, payment of legal costs, a contribution to the contingency reserve fund, deficiency work, additional parking or other benefits.

If these important matters are not addressed at the severance stage, then the strata corporation may have limited effective remedies post court approval and could suffer significant future prejudice.

A strata corporation facing these complex issues should hire legal counsel and a qualified professional for an opinion as soon as practically possible and provide the owners with transparency throughout.