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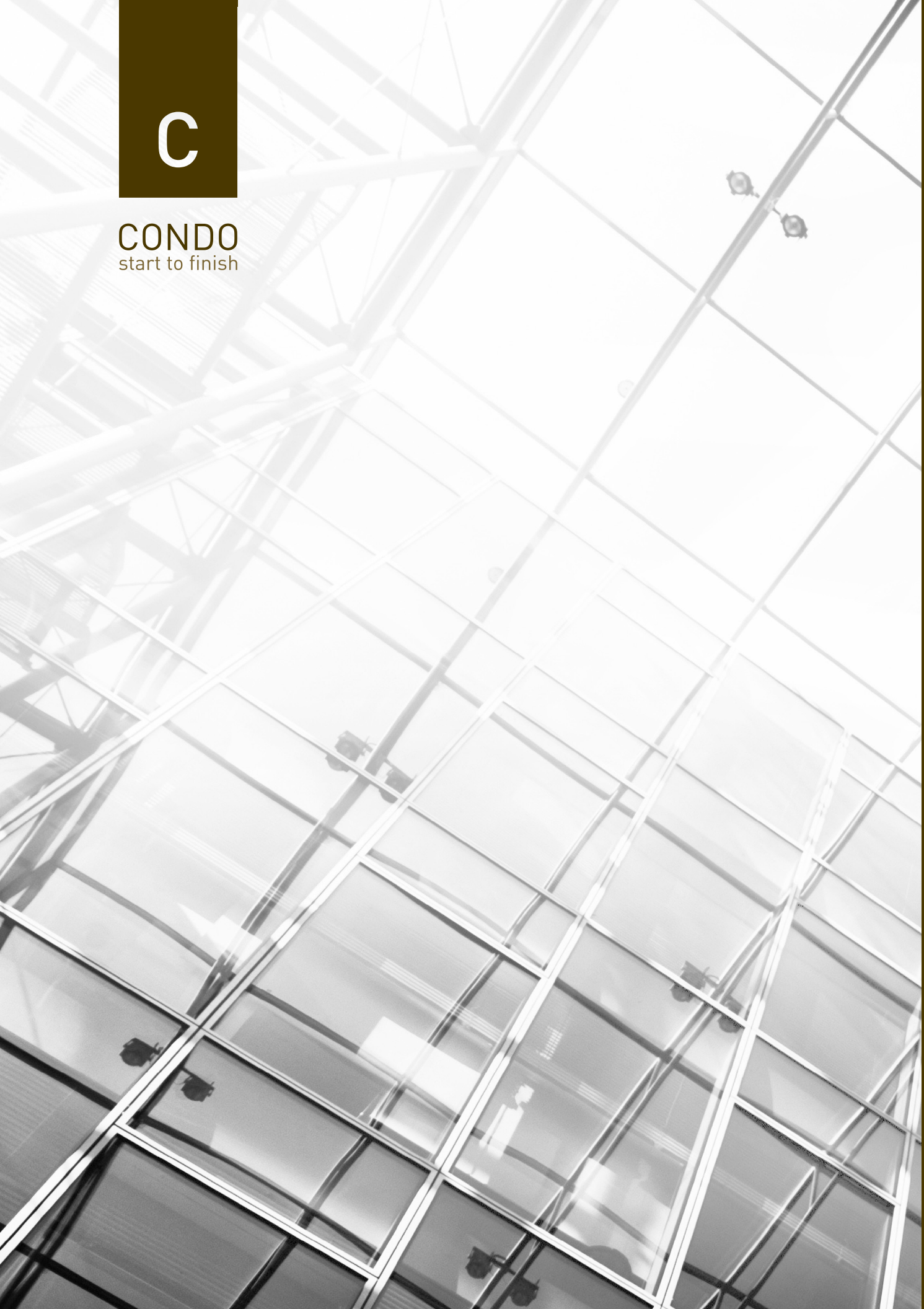

**HARRY HERSKOWITZ** – LAWYER, CONDOMINIUM

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# HARRY HERSKOWITZ

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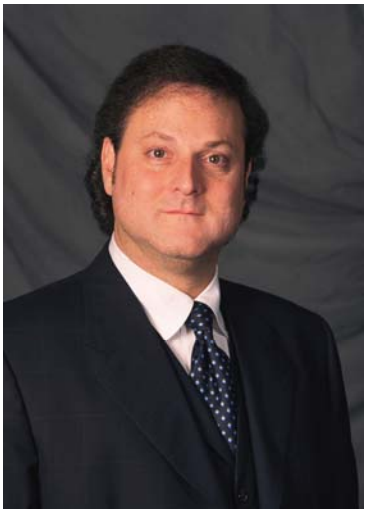

**HARRY HERSKOWITZ** IS A PARTNER IN THE TORONTO LAW FIRM OF DELZOTTO, ZORZI LLP, AND IS HEAD OF THE FIRM'S REAL ESTATE DEPARTMENT.

Mr. Herskowitz is a graduate of Osgoode Hall Law School, and he was called to the Bar of Ontario in 1979. Harry is qualified as an arbitrator/mediator, having completed the Arbitration/Mediation Course at the University of Toronto, School of Continuing Studies in 1994.

Harry's practice is devoted to real estate, mortgage lending and commercial transactions, with particular emphasis on land development and condominium law. Harry's practice also includes the arbitration of disputes involving commercial real estate transactions and condominium issues, and the provision of legal opinions on various aspects of real property law.

Harry has represented numerous developers in the creation of subdivision and condominium developments throughout Ontario, from simple stand-alone residential projects to complex mixed-use, multi-phased and leasehold condominium projects. Harry has been qualified as an expert witness before the Ontario Superior Court of Justice, and frequently provides opinions on real estate conveyancing and condominium issues.

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## CONDOMINIUM LAW REFORM: HIGHLIGHTS OF THE PROPOSED CHANGES

LAWYER'S PERSPECTIVE

**HARRY HERSKOWITZ**
**DELZOTTO, ZORZI LLP**

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# LAWYER'S PERSPECTIVE

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# LAWYER'S PERSPECTIVE

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**DELZOTTO, ZORZI LLP**

# SUPPLEMENTAL MATERIALS

**Condominium Law Reform: Highlights of the Proposed Changes**

by
Harry Herskowitz of DelZotto, Zorzi LLP

For the Program "Condo Start to Finish" Sponsored by BILD, September 17th, 2014

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## 1. INTRODUCTION

The *Condominium Act 1998, S.O. 1998 as amended* (the "**Act**") was proclaimed in force on May 5th, 2001, and when compared to the age of other provincial statutes affecting a significant aspect of real estate transactions in Ontario, the Act is relatively new. However, in the 12 year period following the Act's proclamation, the profusion of condominium projects in the Greater Toronto Area (and in other urban centres) that were spawned by the province's Places to Grow legislation and ancillary land use policies (which, in turn, were intended to increase the density of new residential development in designated urban areas in order to make use of existing municipal/regional services and infrastructure), resulted in condominium dwellings comprising almost half of all new homes built throughout the province. As a by-product of the burgeoning condominium market, various shortcomings in the current condominium legislation were perceived, culminating in the provincial government's desire to review the complex regulatory issues involving condominiums, and to ultimately revise the rules governing condominium communities, in an effort to provide better information to prospective unit owners, to expand the statutory safeguards afforded to condominium buyers, to improve the overall financial management of condominium corporations, and to devise new tools for resolving condominium-related disputes.

The Ministry of Consumer Services (the "**Ministry**") was tasked with the exercise of condominium reform, and it retained the services of the Public Policy Forum ("**PPF**"), an independent not-for-profit organization dedicated to improving the quality of policy-making and legislative reform through a public engagement process that facilitates dialogue between representatives of the provincial

government and the private sector stakeholders who are (or will be) most affected by the proposed legislation. In the first stage of the overall review/reform process which commenced in the fall of 2012, PPF convened meetings with participants drawn from all sectors of the condominium community and industry, including a randomly-selected group of condominium residents across Ontario. Various problems and concerns were identified with respect to the existing legislation, and numerous options for improvement were ultimately proposed. In the second stage of the overall review/reform process which commenced in the spring of 2013, five working groups representing a broad cross-section of condominium interests and stakeholders were created by the Ministry, with the goal of identifying and categorizing the relevant issues and concerns involving the following five distinct areas of condominium law and administration, and concomitantly recommending possible solutions thereto, namely: consumer protection; financial management; corporate governance; dispute resolution; and condominium management. The efforts and recommendations of the five working groups were then considered and deliberated by a twelve-member panel of experts convened by the Ministry, and selected for their expertise in such key areas as condominium development, engineering, finance, condominium management and consumer protection. The overarching goal of the expert panel was to review, ratify and/or refine and synthesize (in a collaborative way) the proposals emanating from the respective working groups, in an effort to ensure that the ultimate recommendations for reforming the Act were effective, fair and balanced, and consistent across the five focused areas. Not all recommendations were unanimous, nor conclusive in forging a precise course of action, and some recommendations were qualified by strong dissenting perspectives. In the end, however, the purpose of the stage two review was to provide the Ministry with guidance on how the issues raised in the stage one findings report (such as improving the way condominiums are managed and governed, and assisting condominium

owners and residents to build a stronger sense of shared responsibility for the well-being of their respective condominium communities) could best be resolved.

PPF released the stage two solutions report on condominium reform on September 24th, 2013, which reflected the final recommendations of the expert panel. Members of the public can access this report at *ppforum.ca/publications/ontarios-condominium-act-review-stage-two*. Stage three of the overall review/reform process, which endured throughout 2013, involved the review and validation of the recommendations of the expert panel, by gathering feedback from the public and various condominium stakeholders on the stage two report. The Ministry carefully considered the recommendations and feedback, along with thoughtful input and analysis from the Ministry's internal policy advisers, and ultimately provided direction to its legislative drafters who have worked on closely-guarded draft legislation that has not yet been distributed or circulated, pending ultimate approval by Cabinet. In the aftermath of the liberal party winning a majority of seats in the most-recent provincial election, it's anticipated that a Bill formally amending the Act will be ready for introduction into the provincial legislature (for first reading) sometime in the fall of 2014.

The purpose of this paper is to highlight the significant changes proposed to the current condominium legislation, emanating from the stage two reform process.

## 2. CONSUMER PROTECTION

***Improved Disclosure:***

In an effort to ensure that condominium purchasers better understand what they are getting into when buying a new condominium unit, and to provide "smarter" disclosure as opposed to simply "more" disclosure, the stage two report proposed the following:

a) A generic form or guide to be produced by the provincial government (and to be accessible online) that would outline the basics of condominium ownership and living (the

"**Condominium Guide**"). All vendor/declarants of new condominiums would be obliged to deliver the Condominium Guide to each unit purchaser on or before entering into the agreement of purchase and sale, and to have each unit purchaser acknowledge receipt of same. Presumably the agreement of purchase and sale would not be binding or enforceable against the unit purchaser until 10 days after the purchaser's receipt of (i) the executed agreement of purchase and sale; (ii) the condominium disclosure statement; and (iii) the Condominium Guide. The Condominium Guide is intended to explain, in simplified terms, the purchaser's statutory rescission rights (both initially and after a material change), the difference between units and common elements, interim occupancy and final closing, what the condominium's declaration, by-laws and rules are generally about, the role of the board of directors, the rights and responsibilities of unit owners (including maintenance and repair responsibilities and insurance responsibilities), the role of the property manager, and the purpose and importance of the disclosure statement (along with the table of contents appended thereto, and the first year budget statement included with same), and should also specifically address the following points or issues:

i) agent representation, and confirm that the vendor's sales representatives are only representing the vendor/declarant, and are not acting as agent for (or on behalf of) the unit purchaser;

ii) interim occupancy versus final closing;

iii) realty tax adjustments;

iv) how the square footage or area of the unit being acquired is ordinarily or generally calculated;

v) the HST new housing rebate, and the unit purchaser's eligibility for same;

vi) assigning the agreement of purchase and sale prior to final closing;

vii) insurance requirements and the responsibility for the condominium's deductible;

viii) the use and enjoyment of live-work units, and any customary restrictions or conditions with respect to same;

ix) the recommendation for residential condominiums to submit a second year warranty claim to Tarion Warranty Corporation (and to consider whether or not there's a need to retain an engineering firm to conduct another engineering audit/inspection of the common elements, or to update the previous audit/inspection); and

x) the recommendation that unit owners should avoid being apathetic towards the affairs and administration of the condominium community in which they live, and should endeavour to be familiar with the rules governing the use of their respective units and the common elements, and make every effort to attend unit owner meetings, and to read all communiques or newsletters issued to the respective unit owners by the board of directors, including without limitation, any summary regarding the condominium's reserve fund study, and to be vigilant about compliance with the condominium's rules, etc.

b) A project-specific disclosure statement, that incorporates or addresses:

i) all of the required disclosure items currently outlined in section 72(3) of the Act;

ii) all of the disclosure items currently outlined in section 17(1) of O'Reg 48/01 to the Act;

iii) all of the items to be addressed pursuant to the mandatory table of contents to the disclosure statement, currently outlined in section 72(4) of the Act; and

iv) the following additional matters, namely:

A. the basis upon which the monthly common expenses or maintenance fees are allocated and attributable to the respective units in the condominium project [eg. based on relative square footage or area, or by relative value or sale price, or a combination of both, or by some other formula or methodology, or randomly];

B. whether short-term transient residential rental occupation of any units is permitted, either on a furnished or unfurnished suite basis, and with or without ancillary maid, laundry and/or other services;

C. whether there are any shared amenities, facilities or areas situate within or beyond the boundaries of the condominium (the "**Shared Facilities**") that are intended to be shared between the condominium and one or more other existing or future condominiums and/or with one or more other entities (eg. the owner of adjacent or nearby freehold lands), and if so, then:

1. the Shared Facilities should (to the extent reasonably possible) be separately metered or check metered for any utilities (ie. electricity, water, gas, thermal energy and/or heating/cooling services) so consumed or utilized in connection therewith; and

2. the cost of operating, maintaining, insuring, repairing and/or replacing the Shared Facilities, and any other costs associated therewith for which the condominium may ultimately be responsible to pay any portion thereof (the "**Shared Facilities Costs**") should be governed by a reciprocal or cost-sharing agreement entered into by or on behalf of the condominium (the "**Reciprocal Agreement**") which expressly:

   (a) confirms the basis or formula (such as relative dwelling unit count, or relative total finished area), or specifies the respective percentages, upon which the Shared Facilities Costs shall ultimately be allocated and paid for, between or amongst the condominium corporation and the other party or parties sharing same; and

   (b) requires that a separate budget be prepared on an annual basis outlining the Shared Facilities Costs, and that a separate reserve fund be maintained (by or on behalf of the condominium corporation and the other party or parties sharing the Shared Facilities) for the major repair and replacement of the Shared Facilities exclusively;

c) In an effort to promote the use of on-line tools to advance consumer education and access to information, the stage two report recommended that every declarant be required to create a project-specific website exclusively for the owners and residents of the condominium (which website would ultimately be maintained by the condominium corporation) that initially contains, in electronic format, the condominium disclosure statement and all accompanying condominium documents, so that all prospective unit purchasers can access these documents, and all amendments thereto (if any) from time to time, and search for key words or phrases to assist them in finding any relevant provisions.

***Prohibition on Selling or Leasing Amenity-Type Units and/or Standard Equipment to the Condominium***

The stage two report recommended that the declarant be expressly prohibited from requiring the condominium corporation to purchase or lease from the declarant (or from any other party or parties), for valuable consideration, any of the following:

a) any recreational amenities or facilities (whether comprising all or part of a recreation centre or recreation unit, or as a stand-alone facility, like an outdoor tennis court or swimming pool);

b) any amenity-type units or areas within the condominium building that would typically comprise part of the common elements, but which have been created as one or more separate units for purposes of selling, leasing, conveying and/or mortgaging same, namely: any superintendent's suite or residence, any manager's office, any recreation administrator's office, any guest suite(s) and/or any lobby, stairwell, service room/area or storage room/area; and

c) any heating, cooling, plumbing, drainage, mechanical, ventilation and/or servicing equipment and/or facilities that are needed for the condominium's proper functioning and day-to-day operations, excluding however any specially-disclosed energy-efficient equipment or facilities (eg. a geo-thermal system, a solar photovoltaic and/or solar thermal system, or a co-generation plant, etc.) that are specifically intended to provide energy efficiencies for the ultimate benefit of the residents of the condominium (the "**Green Energy Facilities**").

With respect to Green Energy Facilities, the stage two report also recommended that:

a) the equipment comprising the Green Energy Facilities should exceed the minimum energy efficiency standards set by the Ontario Building Code and/or the *Green Energy Act 2009*, as applicable;

b) all costs and expenses associated with any Green Energy Facilities that are intended to be sold or leased to the condominium corporation, and correspondingly anticipated to be incurred by

or on behalf of the condominium corporation in its first year of operation, should be fully disclosed, together with the disclosure of the full replacement cost of the Green Energy Facilities (for proper reserve fund purposes);

c) the annual payment(s) in respect of any loan or purchase obligation incurred by or on behalf of the condominium corporation in connection with the acquisition of any Green Energy Facilities should not exceed the value of the energy savings for the same year, as calculated by a third-party engineer, and the term of any such loan repayment (or purchase price payment) should not exceed a stipulated period of time [please note that 10 years has been suggested as the maximum duration]; and

d) any agreement involving the acquisition, installation, servicing, maintenance and/or repair of any Green Energy Facilities would be excluded from the purview of section 112 of the Act, thereby disentitling the post-turnover board from terminating such agreements (in recognition of the benefits of promoting the development of green energy initiatives and/or renewable energy systems in condominium communities that are designed and intended to result in less expensive energy consumption costs for the condominium), provided however that third party energy modeling, testing and/or verification of projected energy savings may be required as a prerequisite to the continued enforceability of such agreements.

***Prohibition on the Declarant Deferring Costs***

In an effort to foster more transparency and accountability, the stage two report recommended that the declarant be expressly prohibited from deferring (and from correspondingly excluding from the first year budget) any and all known or reasonably foreseeable operating costs and expenses that would ordinarily arise (or be incurred) in the course of the condominium's first year of operation, but which only materialize during (and which only first appear in) the condominium's

second year budget. This prohibition would require the declarant to include, within the first year budget (and within any monthly common expense figures during the first year after registration) any costs that the declarant purports to subsidize, either directly or indirectly, during the first year of the condominium's operation, including any costs that are not expended by or on behalf of the condominium corporation because same are already covered under any applicable equipment or manufacturers' warranties (for example, elevator maintenance or servicing costs which are covered under the elevator installer's applicable warranty).

***Avoiding the Subsidization of Costs Generated by Commercial Operations***

In those circumstances where the condominium includes one or more commercial/retail or commercial/office units, as well as any live-work units, the stage two report recommended that each of such units should be separately metered or check metered for all utilities consumed or utilized in connection therewith (ie. electricity, water, gas, thermal energy and/or heating/cooling services). The foregoing proposal is intended to avoid any inequitable subsidization of such utility consumption costs by any other units, or by the residential component of the condominium in favour of the commercial component of the condominium.

Where the condominium is intended to share any areas or facilities (whether situate within or beyond the boundaries of the condominium) with an adjacent commercial building owner (whether retail, office or otherwise), or with an adjacent condominium, then in such circumstances the stage two report recommended that:

a) the Shared Facilities should (to the extent reasonably possible) be separately metered or check metered for any utilities (ie. electricity, water, gas, thermal energy and/or heating/cooling services) so consumed or utilized in connection therewith; and

b) the Shared Facilities Costs should be fully disclosed, and be governed by a Reciprocal Agreement which expressly:

i) confirms the basis or formula (such as relative total finished area, or relative registered dwelling unit count, as applicable) or specifies the respective percentages, upon which the Shared Facilities Costs shall ultimately be allocated and paid for, between the condominium corporation and the adjacent commercial building owner or condominium; and

ii) requires that a separate budget be prepared on an annual basis, outlining the Shared Facilities Costs for each ensuing year, and that a separate reserve fund be maintained (by or on behalf of the condominium corporation and the adjacent commercial building owner or condominium) for the major repair and replacement of the Shared Facilities exclusively; and

c) Schedule "G" to the declaration should require the declarant's architect or engineer to confirm that separate meters or check meters have, in fact, been installed to measure the utility consumption applicable with respect to any Shared Facilities, to the extent reasonably possible.

***Status Certificates***

The stage two report recommended that the fee which may be lawfully charged by the condominium corporation for every status certificate so issued be increased to $125, inclusive of H.S.T. However, no change has been recommended to the 10 day period within which the status certificate must be provided by the condominium corporation. As for the form and content of the status certificate, the stage two report recommended the following, namely:

a) that the status certificate should expressly state that no inspection of the unit has been undertaken by or on behalf of the condominium corporation to confirm the existence of any unauthorized alterations to the unit or to any exclusive common element areas appurtenant thereto, unless otherwise expressly indicated to the contrary;

b) that in addition to the other materials required to be provided in connection with the status certificate, a copy of the disclosure statement that was delivered by the declarant to the board of directors on turnover [pursuant to section 43(5)(l) of the Act] should also be required to be included and delivered with the status certificate, along with the corresponding notation that the veracity or accuracy of the information set forth in such disclosure statement is not being warranted, inasmuch as some of the information outlined therein may have changed after the disclosure statement was prepared, and accordingly same is being provided for general information purposes only, and not for reliance by any unit purchaser(s) or mortgagee(s). A time limit would be established on how long the aforementioned disclosure statement should have to be attached to a status certificate (and it was suggested that this period should not exceed 10 years after the registration of the condominium);

c) the status certificate should not only confirm whether any outstanding litigation claim exists which involves the condominium corporation (either as a party plaintiff or defendant), but also:

   i) whether such claim is (or will be) pursued in the Small Claims Court or the Ontario Superior Court of Justice;

   ii) whether such claim is (or will be) covered by the condominium's insurance, in whole or in part, and if such insurance is insufficient to cover the entire claim amount, then confirm the approximate amount of the claim not covered by insurance; and

   iii) provide a reasonable estimate of the financial exposure to the condominium corporation (including a reasonable estimate of the legal fees and disbursements to be incurred by or on behalf of the condominium corporation) in pursuing or defending any such claim;

d) the status certificate should contain or attach a brief summary of the most current reserve fund study so undertaken by or on behalf of the condominium corporation, if applicable; and

e) the status certificate should confirm whether any pets are permitted within the condominium, and if so, outline any applicable restrictions regarding pets.

***Augmenting the Definition of Material Change***

With respect to the definition of "material change" currently outlined in section 74(2) of the Act, the stage two report recommended that:

a) the definition should be augmented to expressly provide that any change (or series of changes) that ultimately results in an increase in the monthly common expenses attributable to the purchaser's unit that is less than 10% of the total monthly common expenses originally disclosed to the unit purchaser, shall not be considered or construed to constitute a material change;

b) any new taxes, levies or charges (or any increase in existing taxes or any increase in utility consumption rates or charges) which arise (or are imposed) after the initial disclosure statement has been issued, and which ultimately result in an increase in the monthly common expenses attributable to the purchaser's unit, should not be considered or construed to constitute a material change; and

c) any inflation rate or inflation factor referred to in the disclosure statement (which is intended to automatically increase the overall common expenses outlined in the proposed first year budget in those circumstances where the condominium is registered any time after a specific target date for registration), would be expressly excluded from the 10% threshold in the revised definition of "material change", and the inflation rate or factor should be the

lesser of a standard published rate or formula (ie. tied to an objectively-established or government-approved inflation rate that reflects annual increases in the consumer price index and/or annual increases in utility consumption costs that have arisen since the date of the initial disclosure statement) and a stipulated cap.

***The Creation of a Standardized Declaration***

The stage two report recommended the creation of a standardized form of declaration, with standard provisions governing unit boundaries, maintenance and repair obligations, and insurance requirements. The declarant would be entitled to add one or more schedules to the proposed standard declaration in order to create or impose any new or additional duties or obligations upon the condominium corporation, or upon any specific unit owners. However, the standardized declaration would not apply to a vacant land condominium, a common elements condominium, or a commercial or industrial condominium.

***The Minimum Contribution to the Reserve Fund***

In order to provide more transparency and clarity on the actual amount of the common expenses required to fund the condominium's total operating expenses and reserve fund, and in an effort to avoid or minimize the incidents of reserve fund deficits, the stage two report recommended that:

a) every declarant should be obliged to commission and obtain a reserve fund study undertaken by an independent third party engineer or qualified consultant, based on the architectural drawings and specifications for the condominium project proposed at the time that the declarant embarks on the marketing and sale of the units in the proposed project, and such study would correspondingly outline the estimated amount of funds needed to cover the cost of the major repair and/or replacement of all building components and common elements comprising the condominium, at the end of the condominium

corporation's first year of operation (the "**Reserve Fund Contribution**"), calculated on the basis of the respective repair and replacement costs, and corresponding life expectancy, of said building components and common elements;

b) the minimum contribution to the condominium's reserve fund outlined in the proposed first year budget should be the greater of:

   i) the Reserve Fund Contribution, based on the reserve fund study that the declarant must obtain; and

   ii) a stipulated percentage of an amount reflecting the cost of construction per square foot (based on prevailing construction costs published by an accredited quantity surveyor or other qualified entity), multiplied by the total projected square footage of the proposed condominium project;

c) the declarant should be obliged to update its reserve fund study after initial occupancy and prior to the registration of the condominium, at the declarant's sole cost and expense, on the express understanding that if the engineer or reserve fund consultant determines that the Reserve Fund Contribution should be increased from the amount initially set forth in the proposed first year budget (eg. due to increased construction costs and/or changes made to the project), then the first year's common expenses (and the corresponding first year budget) would increase accordingly, but any such increase would not constitute a material change to the disclosure statement (on the grounds that the declarant had acted prudently in obtaining a reserve fund study to support or substantiate its proposed first year Reserve Fund Contribution, and was not at fault for any resulting increase to same); and

d) the declarant should be prohibited from contractually collecting any specific amount from a unit purchaser on the closing of the purchase and sale transaction and intended or earmarked as a contribution towards the condominium's reserve fund, in an attempt to

avoid or reduce the declarant's liability exposure for any resulting reserve fund deficit (or first year budget deficit).

***Revising the Definition of "Maintenance", and Ancillary Proposals***

The stage two report recommended that the definition of "maintenance" in section 90(2) of the Act be amended so as to expressly eliminate the obligation to repair any item or component after its normal wear and tear, in order for any such needed repair work to be funded out of the condominium's reserve fund which has been specifically created for that purpose.

Two ancillary recommendations to the foregoing were the proposals that oblige:

a) the condominium corporation to repair the common elements, whether exclusive use (like a balcony) or otherwise, in recognition of the fact that any defective repair work undertaken with respect to any portion of the common elements may significantly and negatively impact other unit owners; and

b) any unit owner who causes damage to any other unit(s), or to the common elements (and not just damage to such owner's own unit), to be responsible for paying or reimbursing the condominium corporation for the lesser of the cost of the repair, or the amount of any deductible that the condominium corporation must pay under the condominium's master insurance policy.

***Recognizing a Unit Owner's Right to Quiet Enjoyment***

Excessive noise emanating from adjacent units or from the condominium's servicing equipment has become a recurrent problem in many condominium projects, and the stage two report recommended that the Act be amended to formally recognize every unit owner's right to quiet enjoyment, and the corresponding responsibility of the board of directors to take reasonable steps to mitigate or abate excessive noise, and concomitantly deal with noisy residents or equipment accordingly.

## 3. FINANCIAL MANAGEMENT

***Communication and Education on Finances***

Improving the financial management of the condominium's operations and affairs significantly advances and promotes the condominium community's well-being, and in an effort to make the condominium's finances more transparent, accountable, fair and effective, the stage two report recommended the following initiatives, namely:

a) that an introductory on-line course (overseen and coordinated by the Ministry) should be offered to all condominium owners on the basics of understanding a condominium's financial statements, common expenses and special assessments, and promoting an owner's rights to access the condominium's financial records;

b) along with an operating budget, the board should be obliged to produce a reserve fund budget setting out the fund's planned expenditures for each fiscal year, and any significant deviation from the reserve fund study should be clearly explained (and the reserve fund budget should be included in the corporation's annual general meeting package);

c) when any significant expenditures are required beyond those set out in the budget (such as unforeseen repair costs, or an unexpected cost-overrun on a scheduled repair), the board should then notify the unit owners that off-budget spending will be needed for any required work ... the off-budget spending notice should confirm that such expenditures do not require unit owner approval (despite the fact that the unit owners may still have a right to requisition a meeting to vote on the issue), and this notice requirement should be triggered only when the off-budget spending exceeds a certain threshold (reflecting a stipulated percentage of the condominium's overall operating budget, rather than a fixed dollar amount);

d) the condominium's auditor should be required to confirm that the board has formally approved the condominium's investment plan, inasmuch as same would assure unit owners that the plan has been properly reviewed and carefully considered;

e) the annual general meeting package should advise unit owners to insure themselves against the risk of having to pay the deductible under the condominium corporation's master insurance policy; and

f) unit owners should be promptly notified of any increases in the corporation's insurance deductible, and if and when the board cannot obtain directors and officers liability insurance and errors and omissions insurance.

***Reserve Funds***

In order to ensure that the condominium's reserve fund is adequate to cover the cost of major repairs and replacement of the common elements and assets of the condominium corporation as they age, and to avoid unit owners being called upon to make significant extra contributions for repairs that were neither planned nor expected (and which they often can't afford), the stage two report recommended the following:

a) if the reserve fund balance outlined in the condominium's audited financial statements is less than 50% of the balance reflected in the board's notice of future funding in respect of the reserve fund, then the condominium corporation should be required to ask the reserve fund study's author to confirm, in writing, whether or not the study needs to be updated ahead of the normal three year period, and the author's written response should comprise part of the condominium's official records;

b) with respect to the adequacy of the reserve fund, the year over year percentage change in the total contributions to the reserve fund should be no greater than the assumed inflation rate

used in the reserve fund study, except for the first three years after the condominium's registration when the total contributions may be greater than the assumed rate;

c) the minimum budgeted contribution to the reserve fund in year one should be the greater of the amount set out in the reserve fund study that the declarant is obliged to obtain, and an amount based on a formula predicated on a published construction cost per square foot (and no longer tied or connected to a flat percentage of the condominium's operating budget, portions of which have nothing to do with the major repair or replacement cost of the condominium project);

d) access to the reserve fund should be available without unit owner approval for any additions, alterations or improvements to the common elements required by law, such as the installation of a wheel chair ramp to accommodate a handicapped resident pursuant to the Ontario Human Rights Code;

e) the board should be entitled to expend monies from the reserve fund for improvements involving energy-efficient equipment or facilities, without unit owner approval, provided they meet a threshold energy-savings test based on a formula (not yet determined) and correspondingly verified by an independent third party professional engineer or qualified consultant;

f) the cost of implementing any green energy project or initiative would need to be reflected in the reserve fund study (and the corresponding notice of future funding) before it proceeds, to ensure that the condominium's reserve fund can afford same in conjunction with all other required or anticipated expenditures; and

g) the number of years that a condominium corporation takes to recover the additional cost of implementing a green energy project or initiative from the projected energy savings should

be less than a specified percentage (eg. 50% or 60%, but not yet finalized) of the green energy project's life expectancy.

***Operating Budgets***

With respect to the operating budget of a condominium, the board needs to be able to proceed with work that is required to be done, without any unit owner approval or involvement, but should nevertheless be prohibited from pursuing "pet projects" by endeavouring to manipulate the budget so as to avoid the proposed expenditure reaching the threshold percentage of the operating budget that triggers the requirement for procuring the approval of the unit owners thereto. To that end, the stage two report recommended the following, namely:

a) if the total estimated expenditure on any addition, alteration or improvement to the common elements is not more than the lesser of $30,000 or 3% of the annual operating budget in any given 12 month period (as opposed to any given month), then the expenditure can proceed without notice to the unit owners, provided however that the unit owners should be notified if any proposed change results in a material reduction or elimination of services;

b) if the total estimated expenditure on any addition, alteration or improvement to the common elements exceeds 10% of the annual operating budget, then the change will be considered substantial, and in such event at least 25% of the unit owners must be present (in person or by proxy) at a meeting duly called to approve of such substantial change, and the affirmative vote of at least 66 2/3rds of those unit owners present (in person or by proxy) must be obtained in order for the substantial change to be implemented;

c) a standard unit definition should be prescribed and applicable to all residential condominium units throughout the province (ie. to cover a liveable unit with finished walls, ceilings, fixtures and cabinetry, and be sufficiently detailed in order to obtain an insurance valuation

for the unit). However, any condominium corporation would be at liberty to amend the legislated standard unit definition, by enacting a by-law to that effect. The legislated standard unit definition should apply to both new and existing condominium projects, in the absence of a condominium by-law that has created a specific definition;

d) an owner should be responsible for the condominium's repair costs, or the condominium's deductible under the master insurance policy, whichever is lower, as a result of any damage caused to other units, or to the common elements, as a consequence of any act or omission committed by the unit owner or the residents of such owner's unit, and the condominium corporation would be prohibited from enacting a by-law that alters or contradicts the foregoing;

e) with respect to the condominium corporation's lien for common expense arrears, it is recommended that where a genuine dispute arises between the allegedly-delinquent unit owner and the board regarding the arrears, the unit owner has the right to submit the dispute to the new dispute resolution office (discussed hereafter), and until a decision has been rendered in the matter, the condominium corporation should be obliged to carry the cost of its lawyer's letter warning of the impending lien, and the lien process itself will be frozen or suspended pending said decision. If the condominium corporation is vindicated by the decision of the dispute resolution office, then its costs can thereafter be passed onto the delinquent unit owner, and the condominium's lien rights should be re-activated. Conversely, if the unit owner is vindicated by the decision of the dispute resolution office, then the condominium corporation should absorb the entire cost of the legal letter; and

f) an express provision should be enacted that formally authorizes the condominium corporation to "charge-back" any sum of money to a unit's common expenses, in order to recover any

special or additional cost incurred by the condominium corporation because of some action or inaction committed by the unit owner, or as may otherwise be allowed under the Act ... the term “charge-backs” and “exceptional services” should be specifically defined;

***Reserve Fund Investments***

In the context of reserve fund investments, the stage two report recommended that:

a) consideration be given to expanding the current list of financial institutions in which condominium corporations are allowed to deposit their money (such as insurance companies and financial institutions in other Canadian provinces); and

b) consideration be given to allowing two or more condominium corporations to pool their respective reserve funds and/or operating funds, in order to obtain a better rate of return.

***Fraud Prevention - A Sealed-Bid Process***

In an effort to prevent or thwart the fraudulent misappropriation of a condominium’s funds, the stage two report recommended that whenever a condominium corporation contemplates entering into a service contact valued at over $50,000, a sealed-bid contract process should apply to same, so that all tenders in connection therewith are opened in front of witnesses and immediately signed.

## 4. GOVERNANCE

Condominium corporations reflect the essence of true democracies, inasmuch as they are self-governing communities, with an elected board of directors who are duty-bound to manage the affairs of the condominium corporation for the collective benefit of all unit owners, and to take all reasonable steps to ensure that all owners and residents comply with the Act, and the condominium’s declaration, by-laws and rules. However, not all boards meet appropriate standards of accountability and transparency, when making decisions or addressing non-compliant unit owner behaviour.

Accordingly, in an effort to improve the transparency and accountability of board decisions and actions, which are the hallmarks of good corporate governance, the stage two report recommended the following initiatives.

***Access to Records & Information***

With respect to improving access by unit owners to the condominium corporation's records, the stage two report recommended the following:

a) that condominium boards should be authorized to enact by-laws expanding the records that condominium corporations are required to keep and allow access to, and to set retention periods for those records;

b) minimum periods should be set for the retention of different types or classes of corporation documents (insurance policies, warranties, law suits, audited financial statements, engineering reports, minutes, voting records, etc.), and a suggested timetable should be kept on file and be easily accessible to owners;

c) where possible, condominium corporations should seek to convert documents to electronic format, as a best practice, and thereby improve access to same and concomitantly reduce the cost of reproduction;

d) as a best practice, condominium corporations should keep records longer than any legislated minimum retention period;

e) the Act should set out standardized request and response forms for documents, and where access is denied, the condominium corporation should be required to provide the reason for such non-disclosure, in writing;

f) access to certain documents is a basic right, and those documents should be provided free of charge ... for others, a reasonable fee would be appropriate, but only one designed to recover

the cost of providing such access/service (and an estimate of the cost should be provided beforehand);

g) the Act should establish significant fines for corporations that fail to comply with requested access to the condominium's documents (possibly in the range of $1,000 to $5,000, or some other sliding scale linked to the severity of the offence and the size of the condominium corporation);

h) the Act should expressly permit (and encourage) the condominium corporation to keep electronic records, which should be provided free of charge or for a modest charge;

i) a reasonable fee should be charged for the retrieval and redaction of documents;

j) a request for documents should be fulfilled within 10 days for current documents, and within 30 days for all other documents; and

k) as a best practice, contracts between a condominium corporation and any third party should clearly address when and how owners, unit purchasers or mortgagees should be given access to the contract.

***Meetings***

The lack of clarity surrounding owners meetings creates confusion, which in turn, creates a potential for abuse and owner apathy. Accordingly, in an effort to improve how condominium meetings are convened and conducted, the stage two report recommended the following:

a) the creation of a standardized pre-printed proxy form, and as a best practice, proxies should be submitted at least a day ahead of the meeting;

b) to avoid tampering and mis-information, anyone wishing to vote by proxy should be obliged to sign their name on the proxy form next to each director candidate or by-law they are endorsing, and the person giving a proxy should be allowed to write in the name of the

director they wish to vote for, instead of voting for one of the pre-printed names on the proxy form;

c) proxies and ballots should be kept for 90 days, after which they may be destroyed, unless a dispute in connection therewith is filed within this period, in which case the proxies and ballots should be retained until the dispute is resolved;

d) proxies should be available, if desired, in electronic or automated form;

e) the quorum requirements for a meeting of owners should be relaxed, such that the current 25% quorum requirement would apply only to the first two attempted meetings called to discuss a specific issue, but should attendance fall below that level so that neither of the two meetings can lawfully proceed, then the quorum requirements would automatically be deemed to have been met for the third meeting convened;

f) with respect to a meeting requisitioned by unit owners, the board should accept or refuse a request for a requisitioned meeting within 10 days, and be obliged to provide valid reasons if the board refuses to convene the meeting ... if a request for a meeting is rejected, then the complainants/requisitionists should be entitled to remedy any deficiencies in their requisition within a relatively short period of time, and the deadline for the board to respond and act on the requisition would correspondingly be frozen during this rectification period;

g) boards should be barred from refusing a valid requisition, and the Act should include a new requisition form that clearly spells out all of the requirements that pertain to a requisitioned meeting;

h) the threshold for passing a by-law (currently being the owners of a majority of the units voting in favour of same) should be lowered in order to make it easier to enact a by-law, but

the appropriate formula requires further study [the three options being considered are: (i) a majority of the owners of all units voting in favour, either at a meeting (in person or by proxy), or giving their consent within 30 days after the meeting; (ii) two-thirds of the owners present at a meeting (in person or by proxy) voting in favour; or (iii) a majority of those present at a meeting (in person or by proxy) voting in favour];

i) the condominium corporation should be obliged to advise all unit owners on a quarterly basis with respect to certain information relevant to the corporation's affairs, such as financial, reserve fund and legal proceedings (akin to the information contained in a status certificate), and any deviation in the reserve fund should be promptly communicated to the unit owners;

j) to improve transparency, the condominium corporation should disseminate information (such as community and social events) to unit owners by means of periodic notices, via newsletters, e-mail, a bulletin board, chat lines and forums, information meetings, social media and through the corporation's website ... the condominium corporation should create opportunities for unit owners to use these platforms to communicate with the board and each other, and should incorporate best communication practices in board and owner training;

k) to give owners more opportunity to raise their concerns on meeting agendas, and to give owners a more meaningful voice at meetings, the Act should provide for a directors' call notice requesting candidates for the election of directors, and the notice should be issued at least 35 days before any annual general meetings and special meetings, and thereafter the official meeting notice should be sent out at least 15 days in advance of the meeting ... both notices should conform to a checklist of items related to timing, place, purpose, etc.;

l) the directors' call notice should include a call for agenda items from owners, along with a statement of the purpose of the meeting, and the process for responding to the notice

(including a deadline) should be clearly stated ... an electronic response is acceptable, and should be encouraged; and

m) the Act should be amended to expressly allow the use of online tools, such as Skype, for participation at board meetings.

***Directors & Officers***

The lack of training and experience as a director may lead to poor decisions regarding condominium repairs, investments and/or insurance coverage, and accordingly in an effort to ensure that condominium directors are better prepared for their role on the board, the stage two report recommended the following:

a) a minimum mandatory training course should be required for first-time directors, with the following conditions: (i) the course should be short (about three hours in length), and focused on fundamentals; (ii) the Ministry should set the course's goals and define the curriculum; (iii) the course should be available both online and in a classroom; (iv) accredited training agents (outside government) should be entitled to deliver the course, and successful completion of the course should be verifiable; and (v) new directors should be required to complete the course within six months of being elected, or face possible disqualification;

b) directors in self-managed condominium corporations should have more than the proposed three hours of training, to ensure that they are able to meet their additional responsibilities as managers;

c) term limits for directors should be left to individual condominium corporations to decide as they see fit, by means of enacting a by-law to that effect;

d) the current requirement for an owner-occupied elected position on the board should be eliminated; and

e) a code of ethics for directors should be enshrined in the legislation, so that it cannot be altered by a condominium's by-laws.

***Fines & Charge-backs***

Since the power to levy fines against delinquent owners and/or residents could be open for abuse by boards of directors, and would potentially create an extremely divisive and contentious atmosphere within the condominium community, the stage two report recommended an express prohibition against the levying of fines or other monetary penalties by condominium corporations. However, the report recommended that charge-backs to reimburse the condominium corporation for exceptional costs incurred and/or services performed by or on behalf of the condominium (such as the extra cost of picking up garbage created by a non-compliant unit owner) should be clearly recognized and approved by the legislation as a legitimate levy by the condominium corporation, subject to a clear definition of "exceptional services".

***The Rights and Responsibilities of Owners & Directors***

To ensure that owners and directors are clear about their respective rights and responsibilities, the stage two report recommended that a charter of rights and responsibilities be enshrined in the legislation as an educational tool, to assist owners and directors in understanding their respective rights and responsibilities to one another, and their respective roles in making the condominium community work effectively and harmoniously, and should expressly:

a) define the condominium corporation as a community that is based on a contract that all unit owners are deemed to have entered into with one another;

b) encourage owners and residents to explore how the condominium documents relate to their rights and responsibilities, such as maintaining and repairing the building; and

c) require every condominium corporation to publicize the charter in various ways (ie. posting same in the condominium's lobby and on the condominium's website, and including same in each status certificate and within the annual general meeting package).

## 5. DISPUTE RESOLUTION

Even though the current legislation mandates the resolution of certain condominium disputes through mediation and arbitration, and ultimately by court action, these processes are perceived to be slow and expensive, and the Ministry has been urged by various stakeholders to consider more effective ways of resolving disputes. In light of the foregoing, the stage two report recommended the initiatives set out below to expedite the resolution of condominium-related disputes, with the goal of reducing the overall costs associated therewith.

***The Condo Office***

The stage two report recommended the creation of a new umbrella organization, to be known as the "Condo Office", operating as a delegated administrative authority accountable to the Ministry (but through a board of directors at arms' length from the government) which will be responsible for: (i) providing condominium information and advice on relevant issues to condominium stakeholders (online, by telephone or in person), and promoting improved education for condominium owners, residents, directors and managers; (ii) administering a new dispute resolution service, and collecting statistical data on condominium disputes (as hereinafter discussed); (iii) overseeing the licensing of condominium managers (as hereinafter discussed); and (iv) maintaining and administering a registry of all condominiums created in Ontario. The Condo Office would be funded through a combination of user fees, and a proposed annual levy assessed against each condominium unit (to be collected

and remitted by every condominium corporation throughout the Province of Ontario) ranging between $1.00 to $3.00 a month per condominium unit.

The Condo Office would divide disputes between owners and boards into two categories, namely small items, and enforcement issues ... the small items category would include disagreements on access to records, the validity and reasonableness of charge-backs, the validity of proxies and requisitioned meetings, the entitlement to vote, and similar matters, all of which would be decided on a quick or summary basis by a special position or office within the Condo Office called the "Quick Decision Maker", with limited appeal rights (ie. limited to issues about jurisdiction, or issues of law, or where the amount involved is $1,500 or more, and with any appeal to be heard or reviewed by an appeal officer or a panel of other Quick Decision Makers), and with the power to order costs of the proceeding on a prescribed scale. The primary funding for the Quick Decision Maker would come from user fees and the modest levy on condominium corporations proposed to fund the Condo Office). In those cases where the Quick Decision Maker has ruled that an owner is responsible for some costs, then such ruling can be enforced by adding the cost to the unit's common expenses, and where the condominium corporation is responsible for some costs, then enforcement would take the form of a small claims court filing. Non-monetary orders would be enforced in the same way as a court order.

With respect to enforcement issues and other more significant disputes, a second new mechanism known as the "Dispute Resolution Office" would be created as part of the Condo Office, involving a mandatory one to two hour session (possibly through an online forum) aimed at providing early neutral evaluation of the dispute, helping the parties reach a settlement, providing additional information on the issues in dispute, and providing guidance on the next steps in the dispute resolution process. It was also proposed that the staff of the Dispute Resolution Office would not

be qualified mediators, but rather analysts with skills and expertise to provide a quick, neutral, inexpensive and informed assessment of the case, and such assessment would not be binding nor definitive. Participation in the Dispute Resolution Office process would be mandatory, but cases that remain unresolved after the intervention of the Dispute Resolution Office would then move onto mediation, and thereafter to arbitration.

***Disputes Between the Condominium & the Declarant***

For disputes between the condominium corporation and the declarant, either arising from any agreement entered into between them, or with respect to the budget statement and/or any first year budget deficit claim, the stage two report recommended that such disputes should continue to be resolved through mediation and arbitration, but improved through a new default procedure designed to ensure that such disputes are handled more quickly and efficiently. Please note, however, that all other disputes between the condominium corporation and the declarant (such as those involving construction defects) would be resolved directly by the courts.

***Disputes Involving Shared Facilities***

With respect to disputes involving a condominium corporation and any shared facilities, the stage two report recommended that such disputes should continue to be resolved through mediation and arbitration, but improved through a new default procedure designed to ensure that such disputes are handled more quickly and efficiently. Moreover, in those circumstances where at least one condominium corporation is involved, but no reciprocal agreement exists to govern the operation of the shared facilities and the allocation/payment of the shared facilities costs, then mediation and arbitration should be imposed as the mandatory dispute resolution mechanisms, and an application for any type of court order (including the oppression remedy) should be permitted only after mediation and arbitration have been undertaken.

***Disputes with the Condominium's Manager***

In lieu of mediating or arbitrating a dispute between a condominium corporation and its property manager, the stage two report recommended that there should be a fast and effective process within the Condo Office or the courts (or both) to resolve any dispute involving the management contract entered into between them, and to ensure that the condominium corporation can easily attain access to its records that may be wrongfully withheld by the manager. However, please note that any dispute involving the alleged negligence or malfeasance of the manager should proceed directly through the courts.

***Expediting the Mediation & Arbitration Process***

As in the case of disputes between the condominium corporation and any shared facility disputes, the stage two report recommended that mediation involving disputes between the condominium corporation and a unit owner should be improved through a new default procedure that ensures quick and easy selection of a mediator, and the scheduling and conduct of the mediation session. In addition, the condominium corporation should be allowed to pay for the entire cost of the initial mediation session up front, so that the session can proceed expeditiously, and the condominium corporation should correspondingly be entitled to recover the unit owner's share of such cost afterwards. Resolving disputes by arbitration should likewise be improved through a new default procedure that ensures the expedited selection of an arbitrator, the scheduling and conduct of the arbitration proceedings, and the way in which the arbitrator is paid. Please note that the resolution of disputes by arbitration would be left to private market arbitrators.

***Disputes with Tenants of Condominium Units***

The stage two report recommended the creation of a clearer and more effective way to resolve condominium disputes involving tenants who have violated the Act, the declaration, the by-laws or

the rules of the condominium, guided by the following two principles, namely that: (i) the laws governing condominium communities should apply equally to all residents (whether owners or tenants, or guests of an owner); and (ii) unit owners have an obligation to ensure that anyone who occupies their unit (whether a tenant or a guest) complies with the Act, the declaration, the by-laws and the rules of the condominium.

***Indemnity for Costs Incurred***

The stage two report recommended that both condominium corporations and unit owners should be entitled to complete indemnity for reasonable costs incurred in a successful claim using the dispute resolution processes, but this would not apply to proceedings involving the Quick Decision Maker or the Dispute Resolution Office where the successful party can only recover a small cost award by the decision maker. Moreover, mediators should no longer be allowed to allocate costs in respect of any dispute successfully mediated.

## 6. CONDOMINIUM MANAGEMENT

In an effort to address the issue of incompetent, unresponsive, disrespectful and/or dishonest property managers, the Ministry has been urged to consider the creation of clear standards to ensure a reasonable level of competence and integrity, and to that end, the stage two report recommended the initiatives set out below that will hopefully improve the qualification and training of condominium managers, and elevate the standards of conduct expected of them.

***New Two-Stage Licencing Program***

The stage two report recommended the creation of a new two-stage licensing program to be administered under the auspices of a new Licencing Office, developed as part of the Condo Office, to ensure Ontario's condominium managers are properly trained and qualified. The licencing

program would be funded through a combination of membership and licencing fees, fines and penalties, and all condominium managers throughout Ontario would be required to be members of the new licenced organization.

The first stage of the licencing program for condominium managers would require the following entry-level qualifications: (i) must be 18 years of age or older; (ii) must be a high school graduate or equivalent; (iii) must not be an undischarged bankrupt; (iv) must meet the minimum requirements for insurance; (v) must not have a criminal record and correspondingly pass a police check; (vi) must pass a test on basic knowledge of the Act; and (vii) must pay the required fee.

The second stage of the licencing program would impose the following requirements and obligations: (i) must complete designated courses in condominium law, physical asset management, administration and human resources, financial management and customer service; (ii) must gain a minimum of two years experience as a condominium manager; (iii) must comply with the code of ethics and professionalism created by the Licence Office for property managers; (iv) must fulfil any additional continuing education requirements; and (v) must continue to comply with the stage-one eligibility criteria. Following completion of the stage-two training requirements, condominium management candidates would be required to demonstrate their competence by passing a final exam, to be taken within a maximum specified time period following the receipt of their stage-one licence.

***The Certificate of Authorization for Management Firms***

The stage two report also recommended that management firms should be required to obtain a certificate of authorization prior to signing a management agreement with a condominium corporation, and the certificate should contain the following information: (i) the particulars of the firm's legal status; (ii) the company's address for service and the names of its senior executives; (iii)

the names of the company's officials who will ensure that the firm's candidate for the property manager position has complied with all applicable laws, is a full licensee, has no history of discipline problems and has the minimum required experience; (iv) the name of the person responsible for the services provided by the firm; (v) the name of the person who will supervise the delivery of management services and oversee the firm's personnel who will be delivering those services; and (vi) confirm that the property management firm has sufficient insurance coverage.

***Educational Requirements***

The stage two report recommended that the Licencing Office should be tasked with establishing educational requirements for condominium managers, and for approving or accrediting educational service providers and instructors, in connection with the education program created for condominium managers. The foregoing would include developing course curricula and associated evaluation methods, as well as continuing education requirements for condominium management companies, managers and the organizations that train them, with training courses to be offered both in the classroom and online.

***Grand-fathering Existing Condominium Managers***

The stage two report recommended that anyone with ten years or more of verifiable experience as a condominium manager would be exempt from the educational requirements for stage-two licencing, but would nevertheless be required to meet all of the stage-one eligibility criteria, including passing the initial competency test regarding basic knowledge of the Act, as well as the stage-two licencing examination.

***Code of Ethics***

The stage two report also recommended that the Licencing Office should draft a code of ethics for individual condominium managers and condominium management firms, outlining standards of

conduct and professionalism that must be adhered to, reflecting the position of trust and responsibility that condominium managers occupy.

***Mandatory Insurance***

The stage two report recommended that all companies managing condominiums should be mandated to carry fidelity insurance, as well as professional liability insurance for errors & omissions, and the Licencing Office should require proof of coverage as part of the licencing requirements for condominium managers, and as a prerequisite to the issuance of certificates of authorization to management firms. The Licencing Office, in consultation with insurers, would determine the amount of insurance coverage required.

***Self-Managed Condominiums***

The stage two report recommended that directors of self-managed condominiums should be exempt from the condominium management licencing requirements, provided that they do not receive any financial compensation from the condominium corporation for their management services. Conversely, any individual or company that is remunerated by the condominium corporation for management services must be licenced.

***Mandatory Contents of Management Contracts***

The stage two report recommended that all management contracts should be required to include or confirm the following matters, namely: (i) the term of the agreement; (ii) the fees to be paid; (iii) the tasks to be performed by the manager, including who collects the common expenses; (iv) whether the manager is required to carry fidelity insurance, and if so, the level of insurance required; (v) the maximum dollar amount that the manager may spend without board authorization; (vi) the manager's signing authority; (vii) the transfer method for corporate records on the termination of the contract;

(viii) the manager's acknowledgement of compliance with all relevant professional regulations and licencing requirements; and (ix) the termination of the management contract with at least 60 days prior notice.

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