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STRATA PROPERTY: A PRIMER FOR LOCAL GOVERNMENTS

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I. INTRODUCTION

Subdivision by way of strata plan is becoming more common each year as developers seek to capitalize on sale of land that is smaller than a conventionally subdivided parcel. Approving officers and local government staff often have questions about how the ordinary subdivision and local government processes apply to strata plans and strata corporations. This paper is written to help local governments with both the basics of strata property and the intricacies of approving strata subdivisions (to the extent they are within a local government's jurisdiction) and dealing with strata corporations once they exist.

II. STRATA PROPERTY BASICS

A. What is Strata Property?

Both strata and non-strata property are considered "fee simple" property, which means that the registered owner owns all rights associated with the property, except for any exceptions in the Crown grant and any registered charges. Strata property differs from non-strata property in that, when you own strata property, you are a member of a strata corporation that shares common expenses for the management and maintenance of the common property. Strata owners own their individual strata lots and together they own the common property as a strata corporation.

B. Creation of Strata Property

The creation of strata property involves the deposit of a strata plan, of which there are two types. The first is often referred as a "conventional" or "building" strata plan and it creates strata lots that are individual buildings or parts of buildings. In a conventional strata subdivision, the land itself is not stratified; rather each building on the land becomes a different strata lot, or a single building is stratified into multiple strata lots. Elevators, hallways, and similar spaces become part of the common property, and typically the land area surrounding the building or buildings also becomes common property.

The second type of strata plan is known as a "bare land" strata plan. Under the *Strata Property Act* (the "SPA") a bare land strata plan is "a strata plan on which the boundaries of the strata lots are defined on a horizontal plane by reference to survey markers and not by reference to the floors, walls or ceilings of a building". The deposit of a bare land strata plan stratifies a parcel of land such that some of the land becomes strata lots and some of the land becomes common property. In other words, bare land strata lots are much like parcels created under the LTA, except that roads and utilities leading to each strata lot may be located within common property, as opposed to being part of the public system.

C. Common Property and Limited Common Property

Common property is defined under section 1(1) of the SPA as:

> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
>
> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
>
> (i) within a floor, wall or ceiling that forms a boundary
>
> (A) between a strata lot and another strata lot,
>
> (B) between a strata lot and the common property, or
>
> (C) between a strata lot or common property and another parcel of land, or
>
> (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

Common property can be identified on a strata plan usually by the letters "CP" or "C".

Common property is owned by all strata owners as tenants in common in proportion to the unit entitlement of each owner's strata lot, relative to the total unit entitlement of all strata lots. Once a strata plan is deposited at the land title office (the "LTO"), the LTO creates a common property record, and the registrar of land titles is required to note on the common property record all charges and interests that separately charge the common property on a strata plan, any freehold disposition of common property by the strata corporation, and any removal or designation of limited common property.

Pursuant to section 1(1) of the SPA, limited common property is common property designated for the exclusive use of the owners of one or more strata lots. Parking spaces and balconies are common examples of limited common property. Limited common property can usually be identified on a strata plan by the letters "LCP".

III. STRATA GOVERNANCE

When a strata plan is deposited at the LTO, a strata corporation is immediately established (section 2, SPA). All owners of the strata lots within that strata plan are members of that strata corporation. The strata corporation is the body that is responsible for managing and maintaining the common property and the common assets of the strata for the benefit of all the owners. All the powers and responsibilities of the strata corporation can be found in the SPA.

The strata council is the management body for, and conducts the business of, the strata corporation. It performs the powers and duties of the strata corporation, as set out in the SPA, its regulations and the bylaws of each strata corporation. Strata lot owners, individuals representing corporate owners, and tenants to whom owners have assigned voting rights are all eligible for being on the strata council. Each strata lot has one vote at an annual general meeting or a special meeting, unless different voting rights have been established by bylaw. There are many similarities between a strata corporation and a small local government, for example:

- There are yearly elections for strata council from the body of the membership;
- Strata council creates an annual budget and raises funds from owners through strata fees and special levies, to be used as operational funds or placed into the contingency reserve fund for future capital expenditure;
- Though governed generally by the SPA, a strata corporation makes its own bylaws and rules for the use of common property and strata lots;
- Strata council is responsible for enforcing the strata's bylaws and rules; and,
- Members of strata council have a duty to disclose conflicts of interest to other council members and not to vote on matters regarding which they have declared a conflict of interest.

Generally speaking, when a strata plan is deposited at the LTO the strata corporation comes into existence, but its council is not in active operation until the first annual general meeting. In those first few months, the owner developer exercises the duties of the strata council until the first strata council is elected (section 5 SPA). This is why we see the developer signing agreements on behalf of the strata corporation in the early months after strata subdivision occurs.

Once the strata council is established and matures, it is common for strata councils to meet no more often than once a month. Meetings of all the strata owners occur on an annual basis, but can be called more frequently as special general meetings, called either by the strata council or by the owners on petition. For an annual or special general meeting, council must give at least

two weeks' prior written notice to all strata lot owners (section 45 SPA). These slow timelines should be considered when corresponding with strata corporations for land purchase, bylaw enforcement, and similar circumstances.

Corresponding with a strata corporation can be difficult. Strata corporations must file with the LTO all updates to their mailing address, on a document called a Form D. For larger stratas, this will likely be the address of a corporate strata manager who can answer the day-to-day inquiries for the strata. For small stratas, especially stratas of four units or less, strata management is more likely to occur on an informal basis, and it may be simpler for a local government to correspond with each of the strata lot owners directly as well as addressing correspondence to the address on file at the LTO.

A. Strata Finances

The strata corporation is responsible for the common expenses of the strata (section 91 SPA). The funds necessary to pay the common expenses are collected from the owners of the strata lots by way of strata fees and occasionally by special levies or user fees. Strata fees are determined by reference to the budget approved at the annual general meeting and calculated in accordance with each strata lot's unit entitlement.

Common property on its own is not subject to taxation by local governments. Each strata lot together with the owner's share in the common property and any other taxable common assets of the strata corporation is a separate parcel of land for the purposes of assessment and taxation. This means that each strata lot is separately taxed for the purposes of property value taxes, parcel taxes, local service taxes, and so on. The value of the common property is considered by the BC Assessment Authority and forms part of the assessed value of each strata lot in proportion with each strata lot's unit entitlement.

B. Interactions with Local Governments

We often receive questions about the application of local government bylaws and permitting processes to strata property. If the matter at hand deals only with a particular strata lot, the local government should deal directly with the strata lot owner. If the matter is one regarding common property only, such as a building permit application that benefits the common property only, a local government can require that the application be signed by each strata lot owner, not merely by the strata corporation. This is because the strata corporation is not the owner of the common property; rather, all of the strata lot owners own the common property in proportion with their unit entitlements. For example, in the case of *Clarke v. The Owners, Strata Plan VIS770*, 2011 BCSC 240, where a local government received an application for rezoning an entire building strata, the rezoning application had to be signed by each owner (not the strata corporation), and the owners had to be unanimous in doing so.

It is also worth considering the interplay between strata bylaws and local government bylaws. Section 119 of the SPA provides that each strata corporation must have bylaws. The strata corporation's bylaws may provide for the control, management, maintenance and use and

enjoyment of the strata lots, common property and common assets of the strata corporation. Pursuant to section 125 and section 197 of the SPA, the strata council can make "rules" to govern the use, safety and condition of the common property and common assets of the strata corporation. According to the Act, if a rule conflicts with a bylaw, the bylaw prevails.

It is possible for stratas and local governments to each adopt bylaws that regulate the same subject matter. For example, a local government has the authority to pass a noise bylaw for all properties within its boundaries, and a strata has the authority to pass bylaws and rules regarding noise emanating from strata lots and common property within its strata plan. The strata can only enforce its own bylaws and rules, not the local government's bylaw. The local government has no authority to enforce the strata bylaws, and in fact it should avoid being drawn into any neighbour disputes within a strata.

Local government bylaws may also need to address strata bylaws on particular issues. For example, the City of Vancouver Vacancy Tax Bylaw, also known as the "empty homes tax" will levy a 1% tax on the assessed value of residential properties that are unoccupied for more than 6 months in a calendar year. The bylaw contains a specific exemption for a residential strata unit that is vacant because the applicable strata bylaw either restricts or entirely prohibits rental of the unit, but those strata bylaws must have been in effect on the day that the City bylaw was enacted. This grandfathering provision was crafted to avoid the situation of strata owners changing their bylaws after the City bylaw came into effect in order to avoid the effect of the vacancy tax.

The question of whether a local government can contract with a strata corporation to fetter the strata corporation's bylaw making power arises frequently with housing agreements and similar covenants regarding occupancy and tenancy of residential strata units. We have successfully registered covenants and housing agreements at the LTO that require a strata corporation to include a particular provision in their bylaws. Some housing agreements and covenants go further by restricting a strata corporation's ability to file changes to those bylaws in respect of the use of strata lots, as land use matters. We caution that the LTO has questioned this from time to time and it may be difficult for a local government to actually enforce such a covenant regarding changes to strata bylaws. Nevertheless, the owner developer of the strata corporation is free to limit the strata corporation's ability to enact such bylaws by entering into a s. 219 covenant or housing agreement. All purchasers would take title to their strata lots with notice of that s. 219 covenant/housing agreement.

IV. CONVERSIONS OF PREVIOUSLY OCCUPIED BUILDINGS

If the owner of a previously occupied building wants to convert the building into a strata, the building strata plan must be approved by an 'approving authority.' "Previously occupied" means occupied any time in its past for any purpose, including residential, commercial, institutional, recreational or industrial use, but does not include occupation by the developer as a display unit (Strata Property Regulation, s. 14.1). Section 242 of the SPA sets out the basics of this requirement. Within a municipality, the 'approving authority' is the municipal council, and

within a regional district (and not also within a municipality or treaty first nations lands), it is the regional district board. Before the approving authority can approve the building strata plan, the building must substantially comply with the applicable local bylaws and the *BC Building Code* in effect at the time of conversion. In addition, when making its decision, s. 242(6) SPA requires the approving authority to consider:

- The state of the local rental housing stock;
- Proposals for relocation of current occupants;
- The life expectancy of the building;
- Projected maintenance costs due to the condition of the building; and,
- Any other matters that are relevant, in the opinion of the approving authority.

The above requirements show how critical the consideration of rental housing within the boundaries of the local government is to the approving authority's decision. The approving authority has broad discretion to approve or reject the building strata plan. The approving authority can approve the building strata plan subject to conditions, which are usually contained in a covenant registered against title to the strata lots. It is certainly open to local governments to have policies in place about conversions. For example, the City of Vancouver has a very restrictive policy aimed at preserving rental units, including requiring continuing rental housing equal or greater to the number of existing rental units the building contains, whether on the same parcel or on a different parcel. The authority to approve conversion can also be delegated by the approving authority to an approving officer or other designated person.

In order to evidence the approval for a previously occupied building, the surveyor prepares a SPA Form T, which is signed by the approving authority. In contrast, for a newly-constructed building strata, the surveyor prepares an endorsement of non-occupancy (SPA Form S), that is not signed by the approving authority. The owner developer has 6 months after surveyor the Form S is certified by the surveyor to file the strata plan with the Form S, and the LTO will not inquire whether the strata building is occupied after the certificate is prepared, but before the strata plan is filed. The question of what to do if the development contains both unoccupied and occupied units, was decided by the case of *Burton v. Harris* ([2003] BCSC 523). In this case, the B.C**.** Supreme Court held that the Village of Anmore Council should not have approved the conversion of two houses into two strata lots because the second house was newly constructed and was not previously occupied, and because the second house did not comply with the zoning bylaw, since it was not an accessory suite in an accessory building. For both those reasons, the Supreme Court found that the Village Council exceeded its statutory authority under section 242, but no other direction was given to the parties.

V. STRATA SUBDIVISIONS AND THE ROLE OF THE APPROVING OFFICER

This part of the paper examines the role of the approving officer in relation to strata plan subdivisions under the SPA.

A. *Land Title Act* and *Strata Property Act*

Under the *Land Title Act* ("LTA"), the general rule is that a person wishing to deposit a subdivision or reference plan must obtain the approving officer's approval of that plan (LTA, section 91). Part 7 of the LTA sets out various matters for the approving officer to consider in reviewing a plan, including highway access to new parcels, highway access through the lands being subdivided to lands beyond, natural hazards, local government bylaws and the public interest.

These provisions do not, however, apply to strata plans under the SPA. Section 3(1) of the LTA provides, "This Act, except Parts 7 and 8, applies to the *Strata Property Act*, unless inconsistent with that Act". As a result, the role of the approving officer in relation to strata plans is governed by the SPA.

It should be noted that this rule is subject to section 2(3) of the LTA, which provides that "provisions of Parts 7 and 8 of this Act apply to the *Strata Property Act* if stated to apply to the *Strata Property Act*". Under the SPA, Part 7 of the LTA is made applicable to certain dispositions of common property (transfers of freehold estates, leases of more than 3 years and interests conferring a right to acquire a freehold estate or a lease of more than 3 years) and to a conversion of common property into land held by the strata corporation (sections 253 and 265 of the SPA).

1. 'Conventional' Strata Plans

A 'conventional' strata plan creates strata lots that are buildings or parts of buildings.

The SPA does not require approving officer approval of this type of strata plan (as noted, 'approving authority' approval is required where the strata plan includes a previously occupied building).

This presumably reflects the fact that the strata subdivision of a newly constructed building does not engage any local government regulatory function. The prior creation of the parcel upon which the building is constructed will have had to comply with local government minimum parcel size regulations and subdivision servicing requirements and will have received approving officer approval. The developer will have obtained a building permit for the construction of the building, which will have to be constructed in accordance with the Building Code. The development will have to comply with zoning regulations, including in relation to density, height and setbacks. As local government regulations cannot generally regulate the form of tenure of land or buildings, it is clear the Legislature saw no role for approving officers in relation this type of strata subdivision.

2. Bare Land Strata Plans

Section 243(1) of the SPA requires approving officer approval of a bare land strata plan. Section 243(3) states that such approval must not be provided unless the plan complies with the regulations, specifically, the Bare Land Strata Regulation.

While these provisions leave open the possibility that the approving officer has a broader discretion, the courts have clarified that the approving officer is limited to considering whether the plan complies with the Bare Land Strata Regulation. In *ARA Holdings Ltd. v. British Columbia (Provincial Approving Officer)*, 2001 BCCA 397, the B.C. Court of Appeal stated that "Section 938(3) [now section 506(3) of the *Local Government Act*] has the effect of ensuring that the Bare Land Strata Regulations…are a self-contained code for strata plan subdivisions and that an owner need not look further, i.e., to the Municipal Act, for applicable drainage requirements".

(a) The Bare Land Strata Regulation

The Bare Land Strata Regulation establishes a role for the approving officer that in many ways is the same as under the LTA. The approving officer may:

- Refuse to approve a bare land strata plan if he or she considers the deposit of the plan to be against the public interest (section 3(1)(e) of the Regulation);
- Require the dedication and construction of highways to provide necessary and reasonable access to land beyond the land included in the plan (section 5(1)(b)); and,
- Hear from those he or she considers will be affected by the plan (section 3(1)(b)).

There are also some key differences.

The Regulation recognizes 'private' common property access routes providing access to strata lots, which may not need to be constructed to local government bylaw standard. Under section 6 of the Regulation, the approving officer may decline to approve the plan if he or she considers that the width of such access routes is not sufficient to meet police and fire protection requirements, where the routes are not sufficient to provide practical and reasonable access to the strata lots or where the access routes have not been designed or are not capable of being constructed in accordance with standards generally accepted as good engineering practice.

Similarly, the Regulation permits the approving officer to look to standards under local government bylaws for connecting local government water, sewer and storm drainage systems to the land in the plan (section 12). Whereas for on-site services (i.e. within common property), the approving officer's discretion is limited to being satisfied that the services can be constructed "in accordance with the standards set out in the codes, or where the codes do not provide standards, in accordance with standards generally accepted as good engineering practice" (section 13). The Regulation defines "code" to mean, essentially, the B.C. Building

Code, Vancouver's building bylaw and regulations under the *Health Act*, *Gas Safety Act* or the *Electrical Safety Act*, none of which include any standards for the types of services covered by section 13 of the Regulation. Accordingly, 'standards generally accepted as good engineering practice" rule the day.

The courts have clarified that the approving officer cannot simply apply local government standards to internal access roads and servicing. In *Norgard v. Anmore (Village) (Approving Officer),* 2007 BCSC 1571, the Court directed the approving officer to reconsider his approval condition that an internal access road be constructed in accordance with Village bylaw standards requiring "two paved lanes, 6 metres wide with concrete curb and gutter, gravel shoulder and ditches". The Court referred to what is section 506(3) of the LGA and the Village's works and services bylaws and stated, "While they may set standards for dedicated highways, they will have no direct application to private access roads within the subdivision". After referring to the Bare Land Strata Regulation the Court stated:

> "I do not doubt that it is within the Approving Officer's discretion to require access routes of a particular width, configuration and construction. My concern here is that it does not appear that the Approving Officer engaged in any genuine consideration of the needs of this subdivision. Instead he fell back upon a statutory regime that was not directly applicable…He is not precluded from coming to the conclusions that a standard similar to that set out in the Works and Services bylaw is necessary, but if he does, he must provide reasons for his conclusion".

(b) Clustering

One very significant approving officer power under the Regulation is the ability to permit smaller parcels to be created than otherwise would be the case for a subdivision under the LTA based on local government zoning. Section 2(1) of the Regulation permits the approving officer to approve of strata lots having less than the minimum parcel size permitted by the applicable zoning bylaw, if the total area of the land in the plan (excluding access routes) divided by the number of strata lots is not less than the minimum lot size under the bylaw or the average lot size (if any is specified in the bylaw). A developer will typically group such smaller sized strata lots close together or in clusters. This provision allows a developer to create strata lots of a smaller size than would be possible if the minimum parcel size were strictly applied, which can help the property that includes challenging terrain.

In *Tuwanek Ratepayers Assn. v. Sechelt District*, 2014 BCSC 2625, the Court upheld a preliminary subdivision approval of a proposed bare land strata plan that included clustering that met the requirements under section 2(1) of the Regulation. The approving officer's preliminary approval review indicated that amendments to the OCP and zoning bylaw were needed to allow for lots having areas smaller than the minimum size specified in the zoning

bylaw and the Court found that neither the developer nor the approving officer had considered the Regulation at that time. The Court did not, however, set aside the preliminary approval, finding that the developer and approving officer had subsequently recognized that the project could be approved under section 2(1) and the approving officer had revised the preliminary approval.

(c) Approving Officer Avoidance Schemes

Some have gone great lengths to try avoid approving officer approval under the Bare Land Strata Regulation. In *Swan Lake Recreation Resort Ltd. v. British Columbia (Registrar of Titles)* (1999), 26 R.P.R. (3d) 116, the registrar had refused to register a strata plan to create 200 'unconventional' building strata lots and assign to each strata lot, as limited common property, one of 200 RV sites. The Court stated:

> "The strata plan indicates that the several strata lots are 0.07 square metres each in area and stacked in rows to a height of seven levels. Each strata lot has a total space of 0.098 cubic meters. In his "notice declining to register" issued pursuant to section 308 of the *Land Title Act* the registrar characterized what was purported to be a "building" for the purposes of the *Condominium Act* as a "mailbox". In my view, that is an apt description of the purported "Building".

The Court found that it was reasonable to conclude that a building, under what was then the *Condominium Act*, must have floors, walls and a ceiling, and must be capable of occupation, and that the community mailbox compartments do not have floors or ceilings.

B. Phased Strata Plans

The SPA defines a "phased strata plan" as a strata plan that is deposited in successive phases under Part 13 of the SPA. A phased strata plan may include conventional strata lots or bare land strata lots.

Generally speaking, the strata plan will show the boundaries of the land included in the phase and the boundaries of each strata lot within the phase. When the strata plan for the first phase is deposited with the LTA, the strata lots shown on the plan are created, together with the common property within that phase. Lands for future phases lie outside of those boundaries and remain a separate parcel of land. This 'remainder' parcel does not form part of the strata development and remains a separate, non-strata parcel of land (the remainder parcel is not common property or a strata lot). When the strata plan for the second phase is deposited with the LTA, new strata lots are created and join with the existing strata lots as part of the strata development, sharing in common property and strata government. Again, the remainder is a separate parcel. Only when and if the developer deposits the strata plan for the final phase do all of the original development lands become 're-consolidated' as part of a single strata development with a single strata corporation.

A critical point is that with a phased strata, it is always possible that the developer may not proceed with all phases and it is this possibility that frames much of the approving officer's role with respect to phased strata plans.

(a) Phased Strata Plan Declaration (Form P)

In order to proceed with a phased strata development, a developer must deposit Phased Strata Plan Declaration at the same time as it deposits a strata plan for the first phase. The Declaration must be in Form P under Strata Property Regulation Declaration.

The information to be included in the Form P includes:

- A schedule, specifying, among other things, the number of phases, the order of the phases and the common facilities to be constructed in conjunction with each phase;
- A sketch plan showing, among other things, the approximate boundaries of each phase and the approximate location of any common facilities;
- The estimated construction commencement and completion dates for each phase;
- The unit entitlement of each phase;
- The maximum number of units in each phase and the general type of residence or other structure to be built in each phase; and,
- Dates by which the developer will elect to proceed with each phase.

(b) Approving Officer Approval of Form P

Before depositing the Form P, it must be approved by the approving officer.

Section 222 provides that a Form P must be approved by the approving officer, but does not specify any approving officer considerations (such as compliance with local government bylaws or the 'public interest').

In fact, the only express consideration for the approving officer included in the SPA is in relation to common facilities. Section 217 defines "common facility" to mean "a major facility in a phased strata plan, including a laundry room, playground, swimming pool, recreation centre, clubhouse or tennis court, if the facility is available for the use of the owners". Section 223 provides that if common facilities are to be constructed in a phase other than the first phase, or constructed on a separate parcel, the approving officer may only approve the Form P if the

owner developer "(a) posts a bond, an irrevocable letter of credit or other security that, in the opinion of the approving officer, is sufficient to cover the full cost of constructing the common facility, including the cost of the land, or (b) makes other arrangements, satisfactory to the approving officer, to ensure the completion of the common facility".

While the SPA could be much clearer on this point, it appears to be open to the approving officer to consider other relevant matters in deciding whether to approve of a Form P. For instance, the approving officer might consider whether the various potential parcel configurations comply with the local government's minimum parcel size requirements, recognizing that the developer might not proceed beyond phase 1 or a subsequent phase, leaving two 'parcels' of land.

(c) Strata Plans for each Phase

As noted, to proceed with a phase, the developer must deposit a strata plan for the phase. The strata plan for a phase must show, among other things, the boundaries of the strata lots to be created in the phase, the boundaries of the land included in the phase and the location of buildings in the phase (except for a bare land strata plan) (sections 221(1)(d) and 244).

(d) Approving Officer Approval of a Phase

The strata plan for a phase must be approved by the approving officer (section 221(1)(b)).

What are the approving officer considerations for each phase?

(i) <u>Compliance with Declaration</u>

The approving officer must ensure that the phase "substantially complies" with the requirements for that phase as set out in the Form P (section 224(2)). This would include a comparison of the boundaries, the number of strata lots and unit entitlement shown on the strata plan with that identified in the Form P.

(ii) <u>Completion of Common Facilities</u>

Section 225(2) provides that the approving officer must approve the phase if "(a) the owner developer fulfills the requirements of section 223 [the provision of security for common facilities], or (b) the common facility is at least 50% completed, as verified by the certificate of a registered architect or professional engineer". For common facilities to be constructed in phases other than the first phase, security should have been obtained as a condition of Form P approval, as discussed above. Therefore, section 225(2) would appear to only operate to require that the approving officer take security, as part of a phase approval, in relation to the approval of the first phase strata plan and only if the phase one common facilities are not 50% complete.

(e) Approving Officer Administration of Common Facilities Security

With respect to security for common facilities, the approving officer's function is to assist in protecting strata lot purchasers lots from developer failure to complete promised common facilities. Some observations on this function:

- The approving officer does not have any particular expertise either to determine the amount of security to be provided for common facilities or to assess the strength of alternate forms of security or arrangements. Further, it is unclear as to whether the approving officer could require the developer to provide a professional cost estimate, although a developer may prefer this to relying on the approving officer's opinion.

- Once the security has been provided, the approving officer's role in relation to the security is limited. If a bond, letter of credit or other security is to be provided, it is to be in favour of and held by, in most cases, the applicable municipality or regional district, not the approving officer.

- Further, there is no authority for the approving officer or the local government holding the security to actually use the security to complete the common facility. Rather, the security may only be released if the common facility is substantially complete, if the developer and strata corporation agree to the release or pursuant to a court order. Section 226(3) provides that the security must not be released except if one of the requirements of section 226(1) is met: (a) the common facility is substantially completed, as verified by a certificate from a registered architect or professional engineer, (b) the strata corporation and the owner developer have entered into an agreement for completion of the common facility and the security release is authorized by a resolution passed by a ¾ vote, (c) by Supreme Court order on application of the owner developer, where the local government holding the security refuses to release the security, (d) by Supreme Court order in connection with a court finding that a proposed Form P amendment is a significant and unfair alteration under section 233(6), and (e) by Supreme Court order on an application by the strata corporation for determination as to whether the owner developer's election not to proceed with further phases is unfair to the strata corporation.

(f) What if the Developer does not complete all Phases?

With the deposit of the first phase, the lands in the Phased Strata Plan Declaration will be subdivided, with the first phase constituting a strata development made up of strata lots and common property, and the rest of the lands constituting a remainder parcel. It is possible that the developer will proceed no further.

It should be noted that the approving officer's ability to address the issues discussed below rests on an interpretation that the approving officer's discretion to approve of the Form P or a Phase under sections 222(1) and 224(1) is not limited to the owner developer compliance with the other applicable provisions of the SPA. The SPA does not include any express authority for the approving officer to consider matters such as local government minimum parcel size requirements or access to roads and servicing.

(i) Parcel Size and Building Setbacks

Because the remainder parcel may never be consolidated with the strata development, the approving officer will wish to ensure that the remainder and strata development comply with applicable local government regulations in relation to parcel size and configuration. In this respect, the approving officer should consider every possibility – the developer may stop after phase 1 or after phase 2 or after a subsequent phase.

Importantly, in relation to building set backs, section 238(2) of the SPA provides that parcels in a phased strata plan that will be consolidated on deposit of a phase are deemed to be consolidated for the purpose of enabling a building inspector to issue a building permit in respect of a building.

(ii) Access & Servicing

In addition, the approving officer will also typically try to ensure that the remainder parcel and strata development have adequate access and servicing opportunities, which may necessitate the registration of an easement concurrently with the registration of a phase. For instance, if a remainder parcel does not front a road, an access easement should be registered over the first phase. Such an easement would typically include a covenant under section 219 of the LTA in favour of the local government aimed at ensuring that the easement is not discharged or modified without the local government's consent.

Complexities can arise with these types of easements, depending on the phasing layout and order. For instance, if a remainder parcel will have road access after the deposit of the first phase, but will lose that access with the deposit of the second phase, the developer may not be in a position to cause the strata corporation (which will already exist at the time of phase 2) to grant an easement. In such a case, the approving officer might require that the easement be granted with the deposit of the first phase, providing the remainder with highway access through the first phase. If, however, the necessary access goes through the land to be included in the second phase, the easement granted by the strata corporation after the deposit of the first phase may not be sufficient. In such a case, the easement might be drafted to include a promise from the strata corporation to amend the easement to cover the eventual phase 2 common property or to include a clause that provides the easement automatically includes access through common property added with the deposit of the second phase. It is unclear how effective these approaches are in properly securing easement rights over a future easement area.

(g) Amendment to the Form P Election to Proceed Date

An owner developer wishing to amend a Form P to extend the time for making an election to proceed with the next phase, must apply to the approving officer for the amendment (section 232(1)).

The approving officer must not allow a change to the election to proceed time more than once or for more than one year from the date stated in the Form P, unless ordered by the Supreme Court (section 232). Section 232(3) permits the owner developer to apply to the Supreme Court for an order that the approving officer grant the requested time extension.

One might conclude that the approving officer's function with such a request is to simply determine whether a court order is required and, if not required, to then approve of the extension. However, section 232 does not state that the approving officer must approve of the extension where a court order is not required. Furthermore, section 234 requires that the owner developer give notice to the strata corporation of an application under section 232 and permits the strata corporation to make written representations to the approving officer, which the approving officer must then consider in deciding whether to approve or reject the amendment. Accordingly, it would appear that the approving officer may consider other matters that might be relevant to the request.

(h) Other Form P Amendments

Section 233 authorizes other amendments to the Form P and again requires approving officer approval. With such a request, the approving officer will consider the local government issues discussed above in relation to the review of the original Form P (such as minimum parcel size and road and utility access), to the extent those considerations might be affected by the proposed amendments.

In addition, sections 233(3) and (4) require that if common facilities have been constructed in an existing phase, or the strata corporation has become contractually obligated to contribute toward the operating costs of common facilities on a separate parcel, *and* the amendment would reduce the unit entitlement of a subsequent phase, then unless otherwise agreed between the owner developer and the strata corporation, the approving officer may require the owner developer to contribute to the strata corporation's expenses attributable to the common facilities as if there were no such reduction.

Section 234 also applies to amendments under section 233, so the approving officer must consider any written representations submitted by the strata corporation.

VI. PARK LAND DEDICATION & STRATA SUBDIVISIONS

Section 510 of the *Local Government Act* ("LGA") requires that an owner of "land being subdivided" provide park land or make a payment for park land purposes. Under section 455 of the LGA, "subdivision" is defined to include "a subdivision under the *Strata Property Act*". The

Schedule to the *Community Charter* defines "land" in this context to "not include improvements", and that definition applies to the LGA by virtue of section 2 of the Schedule to the LGA. Because section 510 only applies to a subdivision of "land", it does not appear to apply to a conventional strata plan, being a subdivision of a building.

However, a bare land strata plan is a "subdivision" of "land", so section 510 would appear to apply to bare land strata plans. It should be noted that section 510(12) requires that if park land is to be provided, "the land is to be shown as park on the plan of subdivision", which might be read as a reference to the plan of subdivision that triggers the dedication requirement and might in turn suggest that section 510 was not intended to apply to a bare land strata plan. However, subsection (9) requires that the park be provided before final approval of the subdivision, suggesting that the subdivision plan referred to in subsection (12) may be a different plan, suggesting that the park land dedication requirement could apply to bare land strata plan. While far from clear, it appears that the park land dedication requirement may be imposed in relation to a bare land strata plan

With respect to phased strata developments, it is likely that the application of the park land dedication requirement turns on whether the strata development is a conventional building strata or a bare land strata. Although with the deposit of a phase, the land in the phase is subdivided from the rest of the original parcel and consolidated with any previously deposited phases (section 228 of the SPA), this subdivision only creates one new parcel (ignoring any new bare land strata lots) so section 510 of the LGA would not be engaged. Subsequent phases would only re-configure those two parcels, with the last phase consolidating the site into a single strata development.

VII. LOCAL GOVERNMENT DEALINGS WITH STRATA PROPERTY

Local government planning departments often have dealings with strata property and need to know how best to deal with that property and the unique challenges it presents. It is not uncommon for a local government to require statutory rights of way for access over common property, to request easements for benefitting parcels, or to seek road dedications with respect to common property.

Disposals of common property, including interests in common property, are addressed by section 80 of the SPA. The granting of easements and statutory rights of way is dealt with under subsection (2), which requires the following:

> (a) a resolution approving the disposition must be passed by a 3/4 vote at an annual or special general meeting;
>
> (b) holders of financial charges noted on the common property record must consent in writing to the proposed disposition unless in the registrar's opinion the interests of the persons who have not consented in writing are not adversely affected by the disposition; and,

> (c) any document needed to effect the disposition must be executed by the strata corporation and delivered to the land title office accompanied by
>
> > (i) a Certificate of Strata Corporation in the prescribed form, stating that the resolution referred to in paragraph (a) has been passed and that the document conforms to the resolution; and,
> >
> > (ii) the written consents referred to in paragraph (b).

Therefore, in order to register an easement or statutory right of way over common property, the applicant must file a Certificate of Strata Corporation stating that a resolution approving the easement or statutory right of way has been passed by at least a 3/4 vote. An easement or statutory right of way cannot be registered over common property without that certificate.

The greater difficulty comes when a local government requires something more than an easement or statutory right of way. Where a local government requires a transfer of ownership, such as a dedication of a portion of common property as road or park, a Certificate of Strata Corporation confirming a 3/4 approval vote will not be sufficient to complete that transfer.

Under section 80(1) of the SPA, in order to dispose of common property in a way set out in section 253(1), which includes a transfer of a freehold estate, a lease for a term exceeding 3 years, and right to acquire a freehold estate or a lease exceeding 3 years, the strata corporation must ensure that the subdivision requirements of Part 7 of the LTA are met. Under Part 7, a subdivision plan, reference plan, or explanatory plan (including a road dedication plan under s.107) must be signed by each owner holding an interest in the land subdivided. This means that, in order to file a road dedication plan with respect to strata common property, each owner holding an interest in the common property must sign the plan application. As every strata lot owner has an ownership interest in the common property, this means every individual owner's signature is required and, if an owner has granted a mortgage with respect to its ownership interest, every lender's signature is also required.

This can make it very difficult for local governments to acquire road dedications with respect to strata common property. In a recent decision of the BC Supreme Court, the Registrar of the Victoria Land Title Office declined to register a s.107 road dedication plan filed by the Ministry of Transportation and Infrastructure (*British Columbia (Minister of Transportation and Infrastructure) v. Registrar, Victoria Land Title Office*, 2017 BCSC 1999). The plan related to common property transferred by the owners of the strata to the Ministry for highway purposes. Along with the road dedication plan, the Ministry submitted a Certificate of Strata Corporation confirming that the owners had passed a resolution by 3/4 vote approving the disposition of the common property. The Registrar rejected the plan because it did not contain the signatures of all registered owners and all financial chargeholders. The Ministry brought an application before the Court, arguing that the Registrar's interpretation of the statutory provisions

requiring all signatures was unreasonable. The Court determined that the Registrar's interpretation of the LTA and the SPA provisions was reasonable. A dedication of highway under section 107 of the LTA transfers the freehold estate and, therefore, the deposit of a plan under section 107 requires compliance with Part 7 of the LTA. All signatures are required.

Unfortunately, expropriating an ownership interest in common property is no less onerous, as it involves serving the expropriation documents on each owner and financial chargeholder, valuing each owner and financial chargeholder's interest in the common property, and making separate advance payments to each.

VIII. CANCELLATION OF A STRATA PLAN

A. The Basic Requirements

There are circumstances in which terminating a strata corporation is the best choice for the strata owners. For example, as older buildings reach the end of their life cycle, the cost of repairs may become too onerous and may simply not make economic sense for the owners. Cancelling the strata plan may also enable owners to take advantage of redevelopment potential by selling the entire property for development purposes.

Recent amendments to the SPA are intended to make it easier for strata corporations to wind themselves up voluntarily. Effective July 28, 2016, a strata corporation may now proceed to wind itself up with a resolution passed by an 80% vote at an annual or special general meeting, provided that, if the strata has 5 or more strata lots, it then obtains court confirmation. Prior to July 2016 a unanimous resolution of the owners was required.

The change to an 80% approval requirement recognizes the difficulty of the previous and rarely-achieved unanimous vote and puts British Columbia in line with a number of other jurisdictions, including Alberta and Ontario, which do not require a unanimous vote to terminate. The 80% approval requirement means the termination resolution must have 80% approval of all registered owners, not just of those owners present at the annual or special meeting. For those strata corporations with fewer than 5 strata lots, the 80% voting threshold is effectively unanimous.

Under the recent amendments to the SPA, there are two possible routes available to strata corporations seeking to wind themselves up voluntarily: they may do so either with or without a liquidator. The advantage of using a liquidator is that the individual strata lots and the common property are then vested in the liquidator, who is then authorized to sell them. Therefore, if the goal is to dispose of the entirety of the land shown on the strata plan (and any other property owned by the strata corporation), then using a liquidator is the most effective way to proceed. The process without a liquidator results in the dissolution of the

strata corporation and the cancellation of the strata plan with the owners becoming tenants in common, but no sale. Where there are multiple strata owners, each with different percentage interests, it is less likely that they will want to retain ownership of the property as tenants in common.

Under Division 2 of Part 16 of the amended SPA, the voluntary winding up process using a liquidator consists of the following steps:

- Passing a resolution under section 277 at an annual or special general meeting by a margin of at least 80% to cancel the strata plan and appoint a liquidator, which resolution must approve an interest schedule listing each owner's share in the proceeds of the distribution;
- Obtaining an order of the court under section 278.1 confirming the resolution;
- Obtaining a vesting order from the court under section 279, on application of the liquidator, confirming the appointment of the liquidator and vesting the individual strata lots and the common property in the liquidator for the purpose of selling them and distributing the proceeds of sale;
- Delivering the vesting order to the registrar of titles and filing of the vesting order by the registrar;
- Disposing of the property by the liquidator following approval by resolution passed by a ¾ vote at an annual or special general meeting under section 282; and,
- Applying for dissolution following approval of the liquidator's final accounts by a ¾ vote at an annual or special general meeting under section 283.

In the first contested application for an order of the court under section 278.1, confirming the winding-up resolution under section 277, an owner raised a number of objections to the resolution itself and the process that was followed in approving it (*Strata Plan VR 1966 (Re)* [2017] B.C.J. No. 1878). One of those objections was that the resolution was fatally deficient because it did not meet the mandatory requirements of section 277 and 278, in particular with respect to the "interest schedule" that must be appended to and approved by the resolution. The interest schedule listed all of the information that it was required to include, except for the "estimated value of the interest of each holder of a registered charge against the land", as required by section 278(1)(d). The strata recognized the error and sought to rectify it by amending the petition, but it was too late to fix the deficient interest schedule that had been approved at the special general meeting.

Although the respondent did not allege that the omission caused any prejudice to anyone, the Court found that it could not overlook the omission and confirm the winding-up resolution in spite of it. The Court found that the petitioner could not properly be said to have passed a valid winding-up resolution in accordance with section 277 so as to be entitled to bring the application for a court order under section 278.1. The Court concluded (at para. 36):

> To overlook the deficiency as the petitioner urges would be to rewrite the legislation. The legislature has determined that the value estimates are one of the essential ingredients in a valid winding-up resolution. There is therefore no mechanism in the Act to "rectify" their omission, regardless of whether it may have caused prejudice or not.

B. Cancellation of Bare Land Strata Plans

Bare land strata corporations may also want to wind themselves up. The strata corporation may want to convert to a non-strata titled subdivision or the owners may wish to own all of the land and common property as tenants in common. In order to cancel a bare land strata plan, bare land strata corporations must follow the steps for cancellation set out in the SPA, but must also meet the additional requirements of the Bare Land Strata Plan Cancellation Regulation.

Under the Regulation, bare land strata corporations wishing to wind themselves up must notify the applicable local government 90 days in advance. That notice must state whether the owners intend to apply for subdivision of the land within the strata plan and, if so, include a list of any common property or common assets that the owners propose to dispose to a local government or the Province. For example, a bare land strata corporation may wish to transfer responsibility for bare land strata services, such as roads, water, and sewer works. However, the applicable local government does not have to accept responsibility for those services, which may or may not have been constructed, installed and maintained to local government standards. The local government's refusal to accept the existing services could prevent the bare land strata from terminating.

NOTES