

OHBA is 30 Local Associations:

BILD - GTA
Bluewater
Brantford
Chatham-Kent
Greater Dufferin
Durham Region
Grey-Bruce
Guelph & District
Haldimand-Norfolk
Haliburton County
Hamilton-Halton
Kingston-Frontenac
Lanark-Leeds
London
Niagara
North Bay & District
Greater Ottawa
Peterborough & the Kawarthas
Quinte
Renfrew
Sarnia-Lambton
Saugeen County
Seaway Valley
Simcoe County
St. Thomas-Elgin
Stratford & Area
Sudbury & District
Thunder Bay
Waterloo Region
Greater Windsor



Ontario
Home Builders'
Association

**CONDO ACT
CONSULTATION
SUBMISSION:
PHASE 1**

JANUARY 2013

The OHBA submission is a draft document. As the Ministry's consultation progresses, OHBA will continue to refine and elaborate our position on the best methods for improvements to the Condominium Act. We look forward to being engaged on a consultative process that is transparent, balanced and fact-based.



Ontario
Home Builders'
Association

About OHBA

The Ontario Home Builders' Association (OHBA) is the voice of the residential construction industry in Ontario. OHBA represents over 4,000 member companies, organized through 30 local associations across the Province. Our membership is made up of all disciplines involved in residential construction including: builders, land developers, renovators, trade contractors, manufacturers and suppliers. The residential construction industry employed over 325,000 people and contributed over \$42 billion to the province's economy in 2011.

One of OHBA's primary goals is to positively affect provincial legislation, regulatory policy and tax policies that concern the industry. OHBA is a strong supporter of policies that will ensure affordability and choice in housing for the citizens of Ontario. Our comprehensive examination of issues and recommendations are guided by the recognition that choice and affordability must be balanced with broader social, economic and environmental issues.

Our members live, work and play in the municipalities that make up their communities, and our comments should be taken in balance with the fact that we not only do business in the cities, towns and villages in Ontario, we also live and raise our families there.

OHBA Condominium Act Review

OHBA is pleased to have the opportunity to comment directly on some of the themes, issues and potential solutions identified to date through the Condominium Act Consultation. The Ontario Condominium market continues to be one of the most active in North America. Our industry's contribution to jobs and economic activity by way of this type of housing demonstrates the vitality of the industry and a shift in consumer preferences.

While the Condominium Act may require minor adjustments or 'tweaks' fundamentally, the market shift demonstrates our industry's ability to successfully deliver this product type. New condominium purchasers have some of the strongest consumer protection laws in North America. Starting with the robust building code that stresses public safety and energy efficiency, to the Tarion Warranty process where both the condo purchaser's unit and the condo's common elements areas are insured for seven years after construction on major structural defects. Condo purchasers also have a legislated 10-day cooling off period after they sign a purchase of sale agreement with the builder – a protection not currently offered for resale condominiums. The current legislative and regulatory framework provides significant consumer protections between purchasers and builder/developers. OHBA believes that consumer education and better knowledge of their rights as purchasers and obligations as condo owners could be improved on by both government and industry. OHBA also recognizes the potential for better methods of issue resolution between condo members and condo corporations/boards of directors as well as the need for better training and education for property managers and directors.

Any potential changes should consider the significant economic consequences that may come as a result of any reforms. This document urges minor changes where the Act could be modernized and cautions against sweeping regulatory reforms that limit our industry's ability to bring new, affordable housing to market.

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OHBA's primary goal is to positively affect provincial legislation as well as regulatory and tax policies that impact the industry and the broader economy. OHBA is a strong supporter of policies that will ensure affordability and choice in housing for the citizens of Ontario.

We have separated our comments based on the themes identified by the Minister: Consumer Protection; Financial Management; Dispute Resolution; and Governance.

CONSUMER PROTECTION: PROPERTY MANAGEMENT

The incredible success of condo living has meant the creation of large industries that service and maintain these buildings. Property managers are central actors in the condo stakeholder community as they ensure condo buildings are maintained in a standard that protects the long-term investment of the members. Property management are supposed to act as the expertise that Condo Boards rely on to make prudent decisions.

Therefore, OHBA believes that the Ministry should ensure some minimum legislated/regulatory standard for property managers and firms so that Boards can be confident of the advice they receive. Property managers should be able to demonstrate competency in areas that include financial management, business planning, communication, and building maintenance. When creating new regulations around property management the Ministry should consider separate (less stringent) requirements on small condo corporations that are self-managed as well as condos with minimal common elements as there is not the need for the same level of expertise.

OHBA supports an expanded role in the regulation of property management to ensure that condos are maintained at a high level.

CONSUMER PROTECTION: COOLING OFF PERIOD

New condo purchaser's benefit from an increased level of consumer protection as a result of the legislated 10 day cooling off period for all consumer contracts entered into between a consumer and the builder. This provides the new purchaser the opportunity to have their contracts vetted through legal professionals to ensure they are aware of their contractual obligations as well as key condominium fee and occupancy information.

Resale purchasers are individuals that have purchased a condominium from another individual, not the builder. These purchasers do not benefit from a similar level of consumer protection as they do not have a legislated cooling off period. Resale purchasers should have similar protections as new purchasers by either creating a similar cooling off period for resale or improving the content of status certificates to ensure that they are aware of all of the condo fees and contractual agreements entered into between the condo corporation and the declarant. OHBA believes resale purchasers should benefit from the same level of disclosure, protection and information in place for new condo purchasers.

CONSUMER PROTECTION: DISCLOSURE STATEMENTS

Through the Advisory Group meetings, the Ministry has identified one potential reform to the Act is to change the disclosure statement requirements. The Ministry has heard from some stakeholders through the consultation process that improvements in the disclosure requirement should be made. There has been a suggestion for "plain language in purchase agreements to describe who is responsible for the costs of the common elements".

The Tarion Warranty process offers significant consumer protection including: deposit protection whereby Tarion protects condo purchaser deposits; delayed occupancy warranty's for condominiums; condo common element coverage; a one year warranty that protects against any defects in materials, Ontario Building Code violations; a two year warranty that protects against water penetration, defects in materials that affect the building envelope, electrical, plumbing and heating delivery and distribution, as well as a 7-year warranty that covers major structural defects.

OHBA believes that any new subsection mandating additional descriptions of significant features of the existing or proposed declaration is unnecessary as the objective of the prescribed form of Table of Contents is to facilitate the purchaser's ability to locate the significant features of the declaration, rules, and use of common elements and units. Any additional summaries will create a more lengthy and time-consuming document.

Likewise, any requirement for identifying "who is responsible for what cost, both when purchasing a condominium and once it is registered/transferred" is already a requirement of the Act. Form 12, which prescribes the table of contents and requires disclosure of information that includes "a statement as to whether the corporation is required to purchase units, assets or services, or required to enter into any agreements or lease with the declarant (or any subsidiary body corporate, holding body corporate, or affiliate body corporate of the declarant." (Disclosure Statement Table of Contents Under Subsection 72(4) of the Condominium Act, 1998)

The Ministry appears to be identifying to opposing critiques of the current Act – the first is that the disclosure documents are both cumbersome and complicated for consumers. Second, is that builders are not providing enough disclosure to consumers through the required documents. It is incumbent upon the purchaser to practice due diligence when entering the contract. The purchase of a condominium is by its nature a complicated transaction. Any attempt to legislate additional requirements will overcomplicate the legal framework by making changes that either produce more requirements or simplified "plain language" documents. These are legal and binding contractual agreements with serious financial implications for all parties; although simplicity is a laudable goal, it is not always attainable due to the complexities of the arrangements and the magnitude of the transaction.

CONSUMER PROTECTION: DEFERRED COSTS

The Condominium Act allows the declarant to "unitize" rooms, mechanical systems and other components of the condominium building to lease-back onto the Condominium Corporation. This practice is already disclosed through documents available to purchasers as required under the Condo Act.

There are a variety of business and practical reasons why a builder would unitize components of a condominium. There are significant upfront capital costs for a builder to put in certain features in a condominium such as green energy systems that go beyond Ontario Building Code requirements. Many builders prefer to own the geothermal units and other features because this allows them to re-coup those capital costs through the Condo Corporation; although the unit owners are paying for the

geothermal unit through their common element fees, unit owners also benefit through lower utility costs in the building.

A unit owner's ability to understand the costs of their purchase is probably the most important component of their decision to purchase a condominium and any deferred costs should be explicit in the disclosure documents. Purchasers are likely undertaking one of the most significant purchases in their life and it is important that they are reasonably able to determine the cost of a condo in the years ahead. We believe this requirement must be weighed against the declarant's right to structure a contract as they see fit.

OHBA supports in principle that the declarant should not be able to defer certain expenses or payment obligations on the part of the condominium corporation until after the first year following registration. However, any specific changes to the language should be done in consultation with OHBA as there are significant legal implications if this change was considered.

OHBA believes that section 112 of the Act should be amended to encourage green energy initiatives through financing. The Act currently allows the condo corporation to terminate agreements made before the election if a new Board provided that they give at least 60 days' notice in writing of the date of termination. There is currently an exemption for telecommunications agreements. OHBA believes that a similar exemption should be included for green energy systems.

OHBA supports in principle the expansion of Section 112 of the Act to disallow condo corporations from terminating contracts related to green energy systems including geothermal and solar contracts.

DISPUTE RESOLUTION

OHBA supports improved methods for condominium members, corporations and boards of directors to settle disputes fast and effectively. Various conceptual models have been suggested by some of the Panels and public. The consumer already has the appropriate avenues to pursue complaints against the builder through the Tarion Warranty process. Any dispute resolution mechanism needs to exempt builders as a party this would be redundant with current consumer protection legislation.

BOARD GOVERNANCE

The incredible growth of the condominium sector has meant the creation of thousands of new condominium corporations with large annual budgets. After the condo is turned over from the builder, the new elected Board is responsible for multi-million dollar budgets. Although in most cases the Board relies on a property management company to assist them in governance and operations, many have questions the Board's competency with this significant responsibility.

A condominium corporation's ability to manage its affairs long after the builder has left the project is important to the overall well-being of consumer confidence in the condominium sector.

Mismanagement, corruption and incompetence at the Board level reflects poorly on all parties in the sector, and often builders become the scapegoat years down the road by parties for items they had no control over.

Consumer education and awareness should be the cornerstone of reforms. Changes in this area could be done outside the act through “best practice” guides from the Ministry. The Ministry in consultation with stakeholders should produce education materials available online for Board Members that explain the provincial legal, accounting and engineering framework that a Director operates. Although increasing awareness is important the Ministry should weigh education with the difficulty in finding representation to a voluntary position. Any new requirement should not be overly onerous as to make it difficult to find people to run for these positions.

QUORUM

Difficulty in a condo corporation’s ability to reach quorum represents a significant governance challenge. The quorum requirements required for the transfer of control by the declarant are often too difficult for a condominium to achieve. This is especially true in urban areas where there is a higher rental component of occupancy. OHBA suggests that in light of this the Ministry should consider either lowering the threshold for quorum if quorum is not obtained in the first meeting. Or a ‘deemed’ quorum which could be obtained automatically regardless of attendance after the first or second meeting.

FINANCIAL MANAGEMENT: RESERVE FUNDS/ COMMON EXPENSES

There could be improvements in the execution of reserve fund studies. Currently the Act provides little direction with respect to who is qualified to conduct a reserve fund study. Although in practice it is almost always a registered engineer that performs the study, this should be clear in the legislation.

With respect to the appropriate level of funding for a reserve fund – OHBA believes that simply raising the threshold based on the percentage of common expenses is arbitrary and there is not sufficient justification to raise this amount.

PHASING OF VERTICLE CONDOMINIUMS

OHBA also supports improvements to the registration process to allow for faster occupancy. We believe that the Condo Act should facilitate the phasing of registrations, especially in a high-rise setting where construction of 50 or more stories is becoming more common. The construction process means that some units will be complete and ready for occupancy, whereas others will still be under construction for a period of time. Adding to the complexity is the mixed-use purposes of the building – with combinations of commercial/retail, hotel, and residential condo all co-existing in the same building.

OHBA supports an expedited process that more quickly transfers ownership and responsibility from the declarant to the condo corporation within a single building while other common areas and private residences of the condominium building may not be ready for final occupancy.

CONCLUSION

OHBA looks forward to further engagement on the *Condominium Act* with the Ministry and the Public Policy Forum as they continue this important process of engaging the public, stakeholders, and experts to make improvements on this important regulatory framework.

The greatest impact and opportunity for improvements to the Condo Act that will enhance consumer protection and consumer confidence in the Condo Market will be by focusing on improving condo property management, professionalism and experience and the relationship between Condo boards and members to ensure positive, healthy and sustainable condo communities across Ontario.