

Looks are not everything: common elements and the new *Act to Protect Condominium Owners*

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You find yourself as dutiful board members itching to update the lobby of your aged condominium building. The existing wallpaper, baseboards, and concierge desk show the years and require a much-needed face-lift, changing the aesthetic-style of the space. This might seem like a significant alteration, but if the quality of materials used are reasonably close to the original, then the work will likely not mandate giving notice to, or requiring a vote from, unit owners. Oh, if modifications to the common elements were only this simple, this article would end here.

The ability of a condominium corporation to make changes to common elements has long been an area of confusion, dispute, and even litigation. Whether you are a unit owner, board member, or both, the considerations in determining whether a corporation can make a change to the common elements leaves room for interpretation.

On December 2nd, 2015, Bill 106 - *Protecting Condominium Owners Act* passed its third and final reading in the Ontario legislature. The Act, originally titled “**An Act to amend the Condominium Act, 1998, to enact the Condominium Management Services Act, 2015 and to amend other Acts with respect to condominiums**” aims to do just that! Unfortunately, the newly enacted legislation, which has yet to come into force, fails to clarify all of the ambiguity of its predecessor in regard to changes made to common elements.

The new Act will still require condominium corporations to consider all of the traditional requirements: if work to be done will be an “addition, alteration, improvement or change to the common elements, assets or services;” if notice to owners is required; if a meeting and vote is needed; if the modification is considered a “substantial change;” and whether a two-thirds vote of owners in favour of the change is mandated. The amendments, however, do not provide any guidelines regarding stylistic or aesthetic factors of common element changes, continuing to focus on comparable quality of materials used. Further, the “costs more than 10% of the annual budget” rule will still constitute a “substantial change.”

The Act does, however, make a few significant amendments. For example, notice to the unit owners is not required where the estimated total cost of the changes to the common elements is no more than the lesser of 3 percent of the annual budgeted common expenses for the current fiscal year and \$30,000. Moreover, even if the condominium does not surpass the cost threshold of the modification, notice to the unit owners may still be required, if the modification would be considered on an objective basis to cause a material reduction or elimination of owners’ use or enjoyment of their units, the common elements, or the assets of the corporation. This

amendment provides more clarity than the current requirement that notice to owners is not required if the estimated cost of the modification in any given month is no more than the greater of \$1,000 and 1% of the annual budgeted common expenses for the current fiscal year. And as the name of the new Act suggests, this amendment also provides for more protection to the unit owner than its predecessor.

Critics of the new Act, however, have expressed disappointment, having hoped that the Ontario legislature would have defined “substantial change” in qualitative terms. And the introduction of the concept of an objective standard for “a material reduction or elimination of owners’ use or enjoyment,” will surely become a new source of debate. The lesson here, before embarking on a large-scale modification of any nature, consult with a condominium lawyer who can guide you through the process. And when in doubt, err on the side of caution and provide as much communication to the owners as possible.

So a dated lobby might transform from a relic of 1970’s architecture into a futuristic expanse, more reflective of a galactic space station than an earthy suburban environment, but the new Act may still consider the makeover to be within the corporation’s maintenance and repair obligations, suggesting that looks really are not everything.

Andrea Thielk practises condominium law, personal injury law and human rights and advocacy in Windsor, Ontario. This article has been written for informational purposes only, and is not considered legal advice. Please consult with the appropriate professionals for all your condominium needs.