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PUBLICATION

Termination of Agreement under section 112 of the Condominium Act, 1998 - Not So Fast

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In a precedent setting case, the Ontario Superior Court of Justice recently ruled that a board of directors of a condominium must secure the vote of a two-thirds majority of unit owners before terminating an agreement under section 112 of the *Condominium Act, 1998* (the "***Act***") where the effect of that termination would result in a substantial change to the assets or services of a condominium. This decision effectively reigns in a board's authority to terminate by simple board resolution under section 112 by ensuring that the board also considers the requirements of section 97 of the *Act* where such a termination would result in a material change to the unit owners.

The developer, Grandview Living Inc. ("**Grandview**") entered into a renewable energy agreement (the "**REA**") with a non-arm's length supplier to provide geothermal heating and cooling equipment and services to the units and common elements of HSCC 627. The REA was assumed by HSCC 627 pursuant to an Assignment and Assumption Agreement prior to turnover. Post turnover, the newly elected board of directors provided notice of termination of the REA pursuant to section 112 of the*Act*, refused to pay the monthly payments required under the REA and demanded that the developer and/or the supplier remove the geothermal equipment from the building, which was already in full occupancy. Grandview refused to remove the equipment (which would have effectively shut down all heating and cooling in the building) and took the position that the REA had not been validly terminated because the board had not sought owner approval pursuant to section 97 of the *Act*, which requires that all substantial changes to the assets or common elements of the condominium or to the services provided by the condominium to the unit owners be approved by a two-thirds vote of the owners. "Substantial change" is defined under subsection 97(6) of the *Act* as any change with an estimated cost that exceeds the lesser of 10% of the annual budget for the current fiscal year and the prescribed amount, if any, or an expense that the board elects to treat as substantial. In

this case, the condominium's annual budget was approximately $375,000 and the value of the geothermal equipment leased under the REA exceeded the entire annual budget. Therefore, by any measure, any alternatives to the REA would result in new financial obligations in the hundreds of thousands of dollars, which was well beyond the 10% threshold.

The board brought an application to the Court requesting, among other things, a declaration that its purported termination of the REA was valid; that some of the geothermal equipment should either be determined to be the property of the condominium corporation or required to be sold to the condominium corporation at a substantially discounted value; and that the developer should be required to transfer legal title to the units that housed the equipment along with the underground geothermal wells for no additional consideration. Grandview brought a counter-application for, among other things, a declaration that the REA had not been validly terminated because of the board's failure to seek owner approval of the termination pursuant to section 97 of the *Act*. Grandview sought an order that a vote of owners take place to ratify the termination of the REA. If the owners did not ratify the termination, then the REA would be in full force and effect.

The issue before the court was not whether the board complied with the requirements of section 112. The issue was whether the board was required to take into consideration the effect of the termination of the REA and demand for the removal of the geothermal system on the owners of units. If the result of the termination and removal would be a substantial change to the assets, common elements or services within the meaning of section 97 of the *Act*, Grandview argued that the board was obligated to put the recommendation to terminate the REA before a properly called meeting of unit owners for discussion and a vote. The board disagreed, and argued that it was not required to consider section 97 in exercising its right to terminate an agreement under section 112, and therefore the termination should be upheld. It also complained that putting the matter to an owners' vote would be unfair, given that Grandview still owned eleven of the thirty five voting units.

The Court determined that the termination of the REA and the demand to remove the equipment from the condominium would necessarily result in a substantial change to, or alteration of, the assets of the condominium or the services provided to it within the meaning of section 97 of the *Act*. It held that the purpose of section 97 is to require a condominium corporation's board to obtain approval from the unit owners before it authorizes work that is outside the ordinary course of simply maintaining the building. Accordingly, the Court found that the board had an obligation to comply with section 97 and secure the two-thirds majority vote of owners before it the REA could be terminated.

In determining that the board had failed to comply with section 97, the Court held that the board should have first proceeded under section 97, and then section 112 (assuming the owners had voted to terminate). The Court found that section 112 cannot be read in isolation; rather, the various sections of the *Act* have to be read as a whole, keeping in mind the purpose of the *Act*, which is consumer protection legislation. The Court held that sections 97 and 112 did not conflict with each other, and that it was possible to comply with both sections. The Court also

remarked that while the*Act* is intended to protect purchasers from unscrupulous developers, it is also intended to be a “reign on the board”. Accordingly, the Court held that although the board should have sought owner approval before purporting to terminate the REA, in the circumstances, rather than declare the termination of the REA invalid, the board should have the opportunity to obtain a ratification of the termination after the fact. The Court therefore ordered that a ratification vote of the unit owners take place, with full disclosure and proper notice to all unit owners. The Court also took the liberty to set out a detailed process for the board to follow in calling and holding a special meeting of owners for that purpose. The meeting of owners has not yet taken place and so this matter is ongoing. It should be noted that Blaneys acts as counsel to Grandview.

As the dust settles, it appears that the board may be considering appealing the decision, so stay tuned for further updates. In the writer’s view, the Court’s decision and its interpretation of the *Act*was proper and fair to both sides, upholding the *Act’s* primary objective of protecting purchasers of units in condominium buildings.

Tammy A. Evans is a commercial real estate partner at Blaney McMurtry and a member of the firm’s Architectural, Construction and Engineering Services Group (ACES). Tammy has extensive experience in all aspects of construction, mixed use and condominium development law.