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More Disclosure, More Confusion: Recent Amendments to the Strata Property Information Certificate Concerning Parking Stall and Storage Locker Allocation

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MORE DISCLOSURE, MORE CONFUSION: RECENT AMENDMENTS TO THE STRATA PROPERTY INFORMATION CERTIFICATE CONCERNING PARKING STALL AND STORAGE LOCKER ALLOCATION

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I. Introduction

Recent amendments to the Information Certificate (commonly referred to as Form B) have brought into focus the state of confusion concerning parking stall and storage locker allocation. This paper provides a discussion of the methods of allocating parking stalls and storage lockers in strata corporations and an analysis of the validity and risks associated with those methods. In particular, this paper will discuss the now common method of allocating parking stalls via a head lease over the common property parking area.

Strata corporations and property managers are expected to be able to accurately state the parking stalls and storage lockers allocated to a strata lot, and the manner in which that allocation took place.

Given the myriad ways parking stalls and storage lockers can be allocated and the sometimes confusing ways in which that is done, it is understandable that some property managers have a

practice of simply crossing out the portion of the Information Certificate relating to parking stall and storage locker allocation.

Nevertheless, this is an issue that continues to come up. Parking stalls are valuable assets. In a recently completed downtown Vancouver high-rise strata complex, parking stalls sold for $35,000 each. Parking stalls can generate ongoing revenue, particularly from utilities companies with rooftop towers who need a place to put and access their related equipment. Furthermore, strata corporations may want maximum flexibility to use their common property parking areas for whatever they wish.

Irrespective of the financial reasons an owner or strata corporation may care about the parking area, disputes about parking stalls can often be very personal. Unlike a business deal gone bad in which the aggrieved parties argue, perhaps litigate, and move on, parties to a dispute about a parking stall are constantly reminded and confronted with their grievances. Moving on often means moving homes. There is something unique about one's home that leads to litigation that defies logic and reasonable compromise.

II. Amendments to the Information Certificate

The Information Certificate is a standard document set out in the Strata Property Regulation, BC Reg. 43/2000. While not legally required for the sale or transfer of a strata lot, it is routinely required by purchasers and lenders to complete the transfer of a strata lot.

As its name indicates, it contains information that is important to purchasers and lenders. Such information includes the strata fees payable, special levies, the amount in the contingency reserve fund, the strata corporation's bylaws and other useful information.

Importantly, the information disclosed in the Information Certificate is binding on the strata corporation in its dealings with anyone who reasonably relies on it.[1] While this may provide some comfort, that comfort is limited. An Information Certificate is not binding on other owners in the strata complex. Just because the Information Certificate erroneously states a parking stall is allocated to, for example, strata lot 2, does not mean the owner of the strata lot to which that parking stall is actually allocated needs to let the owner of strata lot 2 use it.

As of January 1, 2014, the Information Certificate includes detailed information about the allocation of parking stalls and storage lockers. For the purposes of this paper, I will refer to parking stalls. However, the discussion herein generally applies equally to storage lockers.

The Information Certificate is attached as Schedule "A." Subsections (m) and (n) are the sections relevant to the discussion in this paper.

III. Methods of Allocating Parking Stalls and Storage Lockers

Any parking stall intended to be used in conjunction with a residential strata lot must be either part of a strata lot, limited common property or common property.[2] Where a parking stall is part of a strata lot, confirming that fact is as simple as reviewing the strata plan.

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1 *Strata Property Act*, S.B.C. 1998, c. 43, s. 59(5).

2 *Srata Property Act*, s. 244(2). This paper does not discuss parking stalls or storage lockers not intended for residential use.

Where a parking stall is not part of a strata lot, it may be unallocated common property, or allocated to a strata lot in a number of ways. Broadly, there are only two types of allocated parking stalls; limited common property and allocated common property. A parking stall may be designated as limited common property on the strata plan; by way of amendment to the strata plan by the owner developer[3] prior to the first annual general meeting ("AGM"); by way of unanimous vote; and, by way of a ¾ vote.

Allocating common property parking stalls may be done by way of bylaw; rule; grant of short-term exclusive use; or, a lease or license arrangement.

A. Limited Common Property[4]

A very common way to allocate parking stalls is to designate them as limited common property. Limited common property is common property designated for the exclusive use of one or more strata lots.[5]

There are four ways parking stalls may be designated as limited common property:

(a) designation on the strata plan;

(b) amendment of the strata plan prior to the first AGM[6];

(c) amendment of the strata plan via unanimous vote;

(d) ¾ vote.

1. Designation on the Strata Plan

An owner developer may designate common property as limited common property by a designation on the strata plan at the time of depositing it at the land title office.

A typical strata plan includes on its first page a legend. Typically, limited common property parking is indicated by an oval or ellipse with the number of the associated strata lot written inside it. A review of the legend and the page or pages of the strata plan showing the parking level will indicate the stalls allocated to each strata lot.

This allocation may only be altered by a unanimous vote to amend the strata plan.[7]

2. Amendment of the Strata Plan Prior to the First AGM

An owner developer may amend the strata plan to designate common property as limited common property after deposit of the strata plan, but before the first AGM, in accordance with s. 258 of the *Strata Property Act*.[8]

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3 "Owner developer" is a defined term in the *Strata Property Act* and refers to the person or persons who own the land on which the strata plan is deposited and, consequently, own all of the strata lots upon deposit of the strata plan.

4 While limited common property is a way of allocating common property, it is nevertheless discussed separately for the purposes of this paper.

5 *Strata Property Act*, s. 1(1), "limited common property."

6 *Strata Property Act*, s. 73(a)(i).

7 *Strata Property Act*, ss. 75 and 257.

8 *Strata Property Act*, s. 73(a)(ii).

In doing so, the owner developer must "act honestly and in good faith with a view to the best interests of the strata corporation, and exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances."[9]

Furthermore, the owner developer may designate a maximum of two "extra parking stalls as limited common property for the exclusive use of the owners of each strata lot."[10] In so doing, the owner developer is not required to act with a view to the best interests of the strata corporation.[11]

Extra parking stalls are those stalls in addition to one stall per strata lot, plus one stall per 10 strata lots for visitor parking.[12] For example, in a 50 strata lot complex with 65 parking stalls, there will be 10 extra parking stalls.[13]

As with a designation on a strata plan, an amended strata plan should be available at the land title office. Verifying parking stall allocation should be a simple exercise.

3. Amendment of the Strata Plan by Unanimous Vote

As mentioned earlier, a strata plan may be amended to designate common property as limited common property, or remove a designation of limited common property.

After a successful unanimous vote, an application must be made to the registrar accompanied by a reference or explanatory plan and a Certificate of Strata Corporation stating that the resolution passed and the reference or explanatory plan conform to the resolution.[14]

This is an unlikely method of designating common property as limited common property, or removing such a designation. This is because of the requirements of a unanimous vote. Unlike a majority or ¾ vote, all that is needed is quorum and the requisite number of those who actually vote to pass a resolution.[15] A unanimous vote means a vote in favour of a resolution by all eligible voters.[16] A unanimous vote may be thwarted if one eligible voter does not vote or abstains, or one eligible voter votes against the resolution. In a very small strata corporation, a unanimous vote may be achievable. In a large number of strata corporations, a unanimous vote is simply not practicable.

4. Designation by Way of ¾ Vote

Perhaps in recognition of the difficulty of getting a unanimous vote, the *Strata Property Act* permits designation of common property as limited common property by way of a ¾ vote.[17]

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9 *Strata Propety Act*, s. 258(2).

10 *Strata Property Act*, s. 258(3).

11 *Strata Property Act*, s. 258(5).

12 *Strata Property Act*, s. 258(4).

13 65 – [(1 x 50) + (50/10)] = 10.

14 *Strata Property Act*, s. 257.

15 *Strata Property Act*, s. 1, "3/4 vote."

16 *Strata Property Act*, s. 1, "unanimous vote."

17 *Strata Property Act*, s. 74.

To be effective, such a resolution must be filed with the land title office along with a sketch plan setting our the area that is limited common property and the strata lot or lots entitled to exclusive use of the limited common property.

Unlike other designations of limited common property, where the designation is achieved by way of a ¾ vote it may be removed by a ¾ vote.[18] It is thus important to know how the designation of limited common property was achieved, as that will indicate the level of certainty that the designation will remain unaltered.

B. Common Property

As the owners of strata lots own the common property as tenants in common,[19] unallocated common property parking is what I like to call 'mall parking.' It may be used on a first come, first served basis. While an owner may feel an entitlement to a particular parking stall based on past use or an informal or tacit agreement, there is no such right. A purchaser of a strata lot in a complex with unallocated parking should be informed that he or she will have no right to any particular stall.

1. Bylaw

A strata corporation may pass bylaws "for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation."[20]

A bylaw allocating common property parking stalls would have to be passed by a ¾ vote at an annual or special general meeting. It may also be repealed by a ¾ vote at an annual or special general meeting.[21]

A bylaw is of no effect until it is filed in the land title office in the prescribed form.[22]

Verifying parking stall allocation by way of bylaw is achieved by simply reviewing the strata plan general index at the land title office.

2. Rule

A strata corporation may have rules "governing the use, safety and condition of the common property and common assets."[23]

Rules are passed by a majority vote of strata council. They must be written in a document capable of being photocopied.[24]

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18 *Strata Property Act*, s. 75(2).

19 *Strata Property Act*, s. 66.

20 *Strata Property Act*, s. 119(2).

21 *Strata Property Act*, ss. 126 and 128.

22 *Strata Property Act*, s. 128(2).

23 *Strata Property Act*, s. 125(1).

24 *Strata Property Act*, s. 125(3).

Importantly, a rule ceases to have effect at the first annual general meeting after it is made unless it is ratified by a majority vote at that meeting or at an earlier special general meeting.[25]

If ratified, the rule ceases to have effect when it is repealed, replaced or altered, without the need for further ratification.[26] Unfortunately, the *Strata Property Act* does not set out how a strata corporation may repeal, replace or alter a rule. Presumably, that would be done by a majority vote of the strata council.

While trickier than verifying a bylaw or designation of limited common property, allocation of parking stalls via rule is verifiable. One would need to review the strata council minutes in which the rule was passed and the next annual general meeting or, if there was one, the minutes of an interim special general meeting, to verify the rule was passed and ratified. One should also review any subsequent strata council and general meeting minutes to confirm the rule has not been repealed, replaced or altered.

3. Grant of Short-Term Exclusive Use

A far less secure form of parking stall allocation is a grant of short-term exclusive use. Pursuant to s. 76 of the *Strata Property Act*, a strata corporation may grant an owner or tenant exclusive use of, or special privileges in relation to, common property.

Any such grant may be for no more than one year, but it may be renewed by the strata corporation.[27] It may also be cancelled by the strata corporation on reasonable notice.[28]

The fact a seller has an allocation via grant of short-term exclusive use if little, is any, guarantee a buyer will obtain the same parking stall allocation.

As a grant of short-term exclusive use is given to an owner or tenant, not a strata lot, it is doubtful any such grant can be transferred from a seller to a buyer.

4. Long-term Lease or License

Without doubt, this is the type of parking allocation that creates the most confusion. It is also an increasingly common method of parking stall allocation.

While this paper seeks to remove some of the confusion, it will also highlight some of the concerns raised by this method of allocation.

While a discussion of the reasons why this allocation method has become popular is beyond the scope of this paper, it is perhaps worth mentioning what appear to be the two primary reasons for choosing this method. First, it can be quite profitable. Parking stalls are "sold" for upwards of $25,000 each. As the developer usually must construct a parking area, there is little additional cost to selling a parking stall rather than leaving it as common property or designating it as limited common property.

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25 *Strata Property Act*, s. 125(6).

26 *Strata Property Act*, s. 125(7).

27 *Strata Property Act*, s. 76(2) and (3).

28 *Strata Property Act*, s. 76(4).

Second, it allows for allocation based on what actual purchasers want and are prepared to pay for. It allows for *à la carte* purchasing of strata lots and parking stalls. While designation of extra parking stalls as limited common property accommodates this, it only does so for the extra parking stalls. The vast majority of parking stalls are allocated without knowing which stall(s) each purchaser wants and how much he or she is prepared to pay for his or her preferred stall(s).

Furthermore, unless the terms of the lease or license preclude it, this allocation method allows for the "sale" of parking stalls between owners. For example, a purchaser who buys a strata lot that has the benefit of two allocated parking stalls may be able to "sell" one stall to another owner looking to get an additional stall. In Vancouver, where car co-ops, public transit and bicycling are the preferred methods of transportation for many people, this flexibility in parking stall allocation may allow owners to realize fully on their investment.

a. How It Works

A long-term lease or license arrangement is invariably put in place by the developer around the time of creation of the strata corporation (i.e., deposit of the strata plan). There are many variations on the steps taken and the timing of those steps. However, there is a scheme common to most developments.

In the vast majority of instances, a single-purpose company is created for each development project. This single-purpose company signs the contracts of purchase and sale with purchasers and is the legal and/or beneficial owner of the property.

A separate single-purpose company is formed for the purpose of taking a lease or license over the common property parking areas. Typically the lease is for a nominal amount (e.g., $10) and has a very lengthy term (99 years is quite common).

Owners "purchase" parking stalls through a sub-lease or license agreement.

Upon "sale" of the parking stalls, neither the developer nor the lessee have any ongoing practical interest in the parking stalls.

Setting aside any concerns about the legalities of this model, it generally works at the outset. However, as will be discussed, as time marches on, strata lots are bought and sold, and strata councils and property managers come and go, confusion reigns.

Below, I will discuss both the practical and legal issues raised by this method of parking stall allocation.

b. Lease or License?

A lease creates an interest in land and, as is discussed below, there are certain statutory requirements that must be met for a lease to be valid.[29] Likely for this reason, a license may be the preferred method of parking stall allocation.

As with many things in law, substance trumps form. In *The Owners, Strata Plan 1261 v. 360204 B.C. Ltd.* (1996), 50 R.P.R. (2d) 62 (B.C.S.C.), the court found that a document purporting to be a license was, in fact, a lease.

The relevant wording of the agreement stated: "The Strata Corporation hereby grants to the Company a contractual licence to the exclusive use and enjoyment of the Parking Stalls for a period

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29 See discussion under *The Problem with Leased Common Property*.

of Ninety-Nine (99) years ..."[30] The court was satisfied that, notwithstanding its reference to itself as a license, the agreement was a lease.

On the strength of that decision, it is likely that any licenses that have the characteristics set out above (i.e. a right of exclusive use for a lengthy period of time) will be found to be a lease. In those cases, it would seem likely the license is invalid. It is difficult to imagine a developer who would choose to allocate parking stalls by way of license, and would also ensure compliance with the law relating to leases.

While the common, contemporary practice seems to be the use of a lease, there are thousands of strata corporations in BC. Undoubtedly, many strata corporations have parking allocated pursuant to a license agreement. So long as nobody has reason to, or cares to, challenge the parking allocation, they will continue to operate without incident. Nevertheless, those affected by a parking area license should be accurately advised about the validity of that arrangement and the risks associated with it.

c. Practical Concerns

The lease is either signed by the owner developer prior to deposit of the strata plan, or by the strata corporation after deposit of the strata plan. In the latter situation, the strata corporation is a party to the lease, as it is the lessor. In the former situation, the strata corporation becomes the lessor as the successor in title to the owner developer.

A strata corporation is required to retain copies of written contracts to which it is a party.[31] This would include the lease. While good in theory, in practice this is often not the case. The lease may be lost or perhaps it was never provided to the strata corporation.[32]

Even if a strata corporation has a copy of the lease, it often does not get copies of the sub-leases. The sub-leases are critical to the parking stall allocation, as the lease typically does not allocate any stalls to any strata lots. It is merely a lease for the entire common property parking area. It will not assist in resolving disputes between owners or determining the stalls allocated to any specific strata lot.

Regrettably, it was common for sellers to simply indicate to prospective purchasers the parking stalls a seller believed were allocated to his or her strata lot. This often went unverified and no documents were signed as part of the closing of the sale to effect any transfer of rights in leased parking stalls.

As years go by and strata lots are bought sold, there is often a mix of owners with a well documented history of assignment of the sub-lease and other owners with nothing but a contract of purchase and sale that indicated they were getting a particular parking stall. In my experience, the latter is more common than the former.

Clearly, the amendments to the Information Certificate are intended to address this. However, they cannot remedy a history of confusion and incomplete documentation. For existing strata complexes, owners and strata corporations are left in an unfortunate situation. In instances in

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30 *The Owners, Strata Plan 1261 v. 360204 B.C. Ltd.*, *supra*, at para. 59.

31 *Strata Property Act*, s. 35(2)(g).

32 Section 20(2)(a)(iii) and (viii) both seem to require an owner developer to provide any such leases to the strata corporation at the first annual general meeting.

which the lease is nowhere to be found, one may be well advised to rely solely on that which is available and reliable. That typically means the registered strata plan. It will show the parking area as common property. A court may very well find the parking area is not subject to a lease and, unless another allocation method has been used, unallocated common property.

Where the lease is available, but the sub-leases cannot be found, a satisfactory resolution is more likely. Many leases and sub-leases include provisions providing that the sub-lease is automatically assigned to a successor in title of the strata lot to which the parking stall is allocated. While there may be legal arguments concerning whether such a term is binding on a successor in title, most successors in title will want to be bound by those terms in order to obtain exclusive use of a parking stall.

d. Enforceability of Unregistered Leases

The primary reason for not registering a lease appears to be a desire to avoid property transfer tax. In the cases I have seen, an unregistered lease is almost invariably executed prior to deposit of the strata plan. It is in that context the issues with unregistered leases will be discussed.

Not registering the lease may undermine the intention behind leasing the parking stalls. Sections 20 and 29 and perhaps others, of the *Land Title Act*, R.S.B.C. 1996, c. 250, may apply to hold the lease is not binding against the owners and, perhaps, the strata corporation. Those sections provide:

> 20(1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
>
> ...
>
> (3) Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.
>
> 29 ...
>
> (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
>
> (a) a transfer of land, or
>
> (b) a charge on land, or a transfer or assignment or subcharge of the charge,
>
> is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than
>
> (c) an interest, the registration of which is pending,
>
> (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
>
> (e) the title of a person against which the indefeasible title is void under section 23(4).

The effect of those sections is that, absent "fraud," an unregistered instrument is not binding against anyone who is not a party to that instrument.

Fraud in the context of the above sections is not the same as criminal fraud. However, it remains a high burden for someone seeking to enforce an unregistered charge against a successor in title.

In *Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd.*, 2011 BCSC 124, Bracken J. discussed the interpretation of those sections and competing lines of authority as to what is required to demonstrate fraud.

Upon a through review of the authorities, Bracken J. concluded (at para. 89):

> To prove equitable fraud it must be established that the party acquiring a registered interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument. In addition, there must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents' interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. Something more than simple knowledge is required. This interpretation seems consistent with the clear words of ss. 20, 29 and 30 of the *Land Title Act*.

While the above seems straightforward, the nature of ownership in a strata corporation provides added complexity. Can a strata corporation rely on ss. 20 and 29 of the *Land Title Act*? If not, how does that square with the fact that owners can? If a strata corporation is bound by the lease and the owners are not, what is the practical outcome?

It is important to bear in mind that s. 29 of the *Land Title Act* applies to transfer of land, not transmissions of land. A transmission includes a change of ownership effected by the operation of an Act or law.[33] To the extent deposit of a strata plan can be said to be a change in ownership, it is a transmission and s. 29 does not apply. In other words, assuming it is otherwise valid, an unregistered lease may be binding on the strata corporation and, quite likely, the owner of the strata lots upon deposit of the strata plan; that is, the owner developer. Of course, the owner developer's business is to sell the strata lots.

It is not certain the lease would be binding on a strata corporation. The *Strata Property Act* is clear that common property is owned by the owners of the strata lots as tenants in common.[34] The strata corporation, as a distinct legal entity, does not own the common property. It is, however, charged with managing and maintaining the common property for the benefit of the owners.[35] Furthermore, the *Strata Property Act* provides that it may act as representative of the owners (for example, s. 171 permits it to sue as representative of the owners in respect of matters relating to the common property).

Based on the provisions of the *Strata Property Act*, the developer's successor in title is all of the owners of the strata lots. They, not the strata corporation, own the common property. They, not the strata corporation, are the successors in title upon deposit of the strata plan.

As the strata corporation does not own the common property, it is questionable whether ss. 20 and 29 of the *Land Title Act* have any role to play, as the strata corporation is, arguably, not contracting or dealing with or taking or proposing to take anything from a registered owner. If those sections have no role to play, the obligations, if any, of the strata corporation under the Head Lease would be *in personam*.

Furthermore, as discussed below, once common property is leased it ceases to be common property. It becomes land held in the name of the strata corporation.[36] Arguably, this changes the nature of ownership of the leased property. However, "land held in the name of the strata corporation" is

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33 *Land Title Act*, s. 1, "transmission."

34 *Strata Property Act*, s. 66.

35 *Strata Property Act*, s. 3.

36 *Strata Property Act*, s. 253.

one of the definitions of a common asset.[37] Just like common property, common assets are owned by the owners of the strata lots as tenants in common. Concluding that the change from common property to a common asset has no impact on the analysis of identifying the successors in title and whether they are bound by the lease is made difficult by the fact that the *Strata Property Act* does not simply state the lease of common property changes the common property into a common asset. Arguably, leased common property is neither common property nor a common asset. If that is so, identifying who owns it becomes an exercise in statutory interpretation that no court has yet undertaken.

The complexities of this argument were discussed, but ultimately not decided upon, in *The Owners, Strata Plan NW 1942 v. The Owners, Strata Plan NW 2050* and *The Owners, Strata Plan NW 2050 v. The Owners, Strata Plan NW 1942*, 2008 BCSC 258 at paras. 78-88 [*"Strata Plan NW 2050"*].

Determining whether the strata corporation is bound by an unregistered lease is only part of the problem. The other part is the strata lot owners. Are they bound by an unregistered lease?

In respect of the first owners, the answer seems to be 'yes,' as deposit of the strata plan effects a transmission of land, not a transfer.[38] In every case the first owners of the strata lots will be the owner developer who will have been a party to the lease. Importantly, the first owners are not the first purchasers.

Clearly the transfer of a strata lot from the owner developer to a purchaser is a transfer, not a transmission. Absent fraud on the part of the purchaser, he or she will not be bound by the unregistered lease.

Interestingly, because of the unique ownership rights created under the *Strata Property Act*, this may result in a situation in which the strata corporation is bound by the lease, but the owners are not, or *vice versa*. It may also result in a situation in which some owners are bound by the lease (for example, if the owner developer retains ownership of some strata lots) and others are not.

How such a situation would work in practice is difficult to predict.

In *Strata Plan NW 2050*, the court dealt with a somewhat analogous situation. In that case, the court had to determine if an easement was binding against the strata corporation, owners who purchased their strata lots prior to registration of the easement, and owners who purchased their strata lots after registration of the easement.

As the easement agreement was signed by the strata corporation, the court held that it, as a distinct legal entity, was bound by its terms. Those who purchased after its registration were similarly bound by its terms. Those who purchased prior to its registration, but after its execution, presented a more difficult problem. On the unique facts of that case, the court found that the easement had been submitted in 1988 and was pending until it was registered in 1995. As such, s. 29(1)(c) (which provides that an unregistered, pending charge is binding on successors in title) applied and the easement was enforceable against those owners.

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37 *Strata Property Act*, s. 1, "common asset."

38 It is unlikely s. 20 of the *Land Title Act* could be relied upon, as the owner developer likely will have executed the Head Lease in its capacity as owner of the lands prior to deposit of the strata plan. Furthermore, as discussed later in this paper, an attempt by the owner developer to escape its obligations under the Head Lease would likely constitute the requisite fraud contemplated in s. 29 of the *Land Title Act*.

The court went on to consider the matter should its conclusion as to when the charge was pending be wrong. Russell J. noted the "practical paradox" of finding the easement binding against the strata corporation and some owners, but not other owners. She did not resolve this through an interpretation of the fraud exception in s. 29 of the *Land Title Act*. Rather, she said, on the facts of that case, the issue was not one of fraud, but of "adoption [of the easement] by conduct and estoppel."[39]

It is important to note that *Strata Plan NW 2050* considered a case of a registered charge. The conflict arose as a result of the lengthy delay in actual registration of the charge. While the court was clearly concerned about the practical implications of finding a charge against common property binding on some owners and not on others, the peculiar facts of that case provided a way to resolve that conflict without addressing the issues raised above. It remains to be decided how a future court will reconcile a similar conflict.

Assuming the appropriate resolution is one in which some owners are bound and others are not, owners who sign sub-lease agreements would likely be bound by those agreements. It is important to keep in mind that the lease would remain a valid agreement. It would just be limited in who it could be enforced against. As the sub-lease derives from a valid lease, the lessee would have property rights it could transfer. It is less clear whether those same owners would be bound by the terms of other owners' sub-leases. That is, would owner A be obligated to respect owner B's exclusive use of a parking stall where both owners have executed sub-lease agreements? The answer would appear to be 'no.' As owner A is not party to owner B's sub-lease, and the lease is not binding against owner A, owner A would be at liberty to treat owner B's parking stall as unallocated common property, and *vice versa*. Furthermore, owners who are not bound by a sub-lease would presumably be entitled to treat all common property as just that, irrespective of other owners' sub-leases.

As one can see, a satisfactory solution in such an instance is hard to come by.

e. Compliance with Fiduciary Obligations

A strata corporation has the power and capacity of a natural person.[40] This includes the ability to contract. As such, upon establishing the strata corporation (i.e., deposit of the strata plan) any leases of common property must be signed by the strata corporation. From the time of establishment of the strata corporation until the strata corporation's general meeting, the owner developer functions as strata council. In doing so, the owner developer owes a fiduciary duty to all owners in the strata corporation.[41] The courts have held that the fiduciary duty is owed not only to present owners, but prospective owners as well.[42]

It is clear that leasing the parking area for a nominal sum to a related company is not in the best interests of the owners. One way to attempt to avoid breaching the fiduciary duty is to enter into the lease prior to the duty arising. This may explain why many leases are executed prior to deposit of the strata plan.

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39 *Strata Plan NW 2050*, at para. 108.

40 *Strata Property Act*, s. 3.

41 *Strata Property Act*, s. 6.

42 *The Owners, Strata Plan 1261 v. 360204 B.C. Ltd.*, *supra*, at para. 115.

Whether the fiduciary duties can be avoided by simply acting prior to deposit of the strata plan is debatable. In *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 122 D.L.R. (3d) 280 (Ont. C.A.) ["*York*"], the Ontario Court of Appeal that an owner developer's fiduciary duty arises no later than when it starts to sell units.[43] The underlying rationale for that conclusion appears to be based on the fact that each purchaser had an equitable interest in the strata lot he or she had contracted to purchase.

While *York* has been cited in BC no less than 10 times, it does not appear to have been cited for the proposition that an owner developer's fiduciary obligations arise prior to establishment of the strata corporation.

There are good reasons to believe the holding in *York* will not be applicable to many, if not all, pre-sale contracts in BC.

The vast majority of pre-sale contracts contain a provision that state the contract creates contractual rights only and not any interest in land. In *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 ["*bcIMC*"], Burnyeat J. held that such a provision was effective in denying contract holders an equitable interest in the land they had contracted to purchase.

Furthermore, in *bcIMC*, Burnyeat J. considered whether, notwithstanding the contractual provision, an equitable interest had yet arisen. He held that the availability of specific performance was a condition precedent to the creation of an equitable interest in land. This conclusion is contrary to the holding in *York* where specific performance was not a condition precedent to the establishment of an equitable interest in land. Assuming *bcIMC* is correct (at least, in BC), it appears unlikely an owner developer's fiduciary obligations will be found to have arisen prior to deposit of the strata plan.

Where the lease is executed after deposit of the strata plan, the owner developer cannot as easily avoid its fiduciary obligations. One may wonder why an owner developer would ever execute the lease after deposit of the strata plan. As is discussed below, entering into a lease prior to deposit of the strata plan comes with additional concerns not present when the lease is signed after deposit of the strata plan.

If the lease is entered into after deposit of the strata plan, it must be done so in the name of the strata corporation. This is merely a matter of form, as it will be signed during the period in which the owner developer functions as strata council. Nevertheless, it is critical the lease be signed in the name of the strata corporation, not the owner developer. If this is not done, the lease is likely invalid.

While there may be some policy debate about whether an owner developer ought to be able to avoid its fiduciary obligations through a disclosure statement, the present state of the law appears to allow just that. That is, so long as the facts that constitute the breach of fiduciary duty are clearly set out in the disclosure statement, BC courts uphold the validity of the lease.

In *Terrace Corporation (Construction) Ltd. v. Condominium Plan Number 752-1207* (1983), 146 D.L.R. (3d) 324 (Alta. C.A.), the Alberta Court of Appeal held that non-disclosure of a developer's plan to sub-lease parking stalls to non-residents was a breach of its fiduciary obligations. In that case, the owners knew of the developer having granted itself a long-term lease over the parking

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43 *York*, *supra*, at 467.

facilities. The developer had disclosed it would sell the additional parking stalls to owners and any unsold stalls would be available for visitor parking. As the developer did not disclose that it could or would sell the parking stalls to non-owners, such commercial exploitation of the common property was deemed a breach of fiduciary duty and the sub-leases were voidable at the instance of the owners of the common property.

In *GC Capital Inc. v. Condominium Corporation No. 0614475*, 2013 ABQB 300, the Alberta court stated, at para. 30:

> ... [N]otice to prospective purchasers of circumstances that might otherwise be seen as a breach of the fiduciary duty of a developer is considered when determining whether a breach has, in fact, occurred. However, notice is not always determinative.

In that case, while acting as the board of the strata corporation (the equivalent of the strata council in BC), the developer caused the strata corporation to lease its geoexchange equipment to a company related to the developer.

Describing the level of disclosure, the court stated:

> [8] A disclosure book was prepared and printed in July, 2004. Schedule M in the book provides that "[t]he Vendor [Gateway Macleod] may elect in its sole discretion ... to utilize geoexchange equipment rather than conventional systems to heat ... the project ... [and if so] shall cause the Corporation to enter into an equipment lease agreement with a reputable entity (which may include the Vendor or an affiliate of the Vendor)". The schedule included the terms of the proposed lease agreement. At some point a revised disclosure book was prepared.

Notwithstanding that the lease of the geoexchange equipment had been disclosed, the court found the level of disclosure in adequate:

> [35] Regardless of the other failures to disclose argued by the Condominium Corporation, the failure to disclose the sale price of the geoexchange unit and the signing of the contract by the Condominium Corporation are arguably improper conduct and breaches of the duties and obligations of the developer.

In contrast to the above two cases, in *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprise Inc.*, 2007 BCSC 774, the court found disclosure was sufficient to hold there was no breach of fiduciary duty. In that case, a developer of a bare land strata development, while functioning as strata council, granted itself options to purchase common property parklands. It was understood that the parklands were used for septic; that the strata would eventually be connected to sewer; and the only reason for making the parklands part of the strata was to provide septic. Were septic not required, the parklands would never have been part of the strata plan.

After deposit of the strata plan, but before transferring any strata lots, the options were registered on the common property registry of the strata corporation. Each option provided the developer could purchase the land for the nominal sum of $10.

The disclosure statement included the following:

> The Developer will grant an Option To Purchase the Common Area septic disposal fields in each phase in favour of the Developer, which Option To Purchase will only be exercisable by the Developer in the event that the development is serviced with a Municipal or other public sewage system at the date of exercise.

There was no other reference to, or description of, the options.

After a detailed review of cases in which developers were alleged to have breached their fiduciary duty, the court noted:

> [29] The cases in which courts have found that the developer has been in breach of its fiduciary duty, regardless of notice, are cases in which the limitation has not been included in the disclosure statements nor registered against the title to the property so that the prospective purchaser can determine the extent of any restrictions on the common property by searching the title.

The court concluded that there was no breach of fiduciary duty, as there was adequate disclosure. Interestingly, the court did not spend any time considering whether disclosure of the terms of the options was required. Rather, the court stated that the "options were registered against the common property prior to any lots being sold so the full details of the options would have been known to any purchasers prior to them purchasing their individual lots."[44]

It is not clear on the reasons for judgment whether any contracts of purchase and sale were entered into prior to deposit of the strata plan and registration of the options. If there were, it is difficult to support the court's conclusion that purchasers would have had the full details of the options prior to contracting.

It should be noted that *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprise Inc.* was overturned on appeal on a separate issue.[45] The Court of Appeal held that the options were subdivisions that did not comply with s. 73 of the *Land Title Act* and, as such, invalid.

The common thread in these cases, and the cases cited in them, is one of adequate disclosure or notice. The argument goes that, with adequate disclosure, a purchaser can choose to proceed and waive the breach, or not to proceed at all. Whether it is good policy to, in effect, deny a consumer the right to insist the owner developer meet its fiduciary obligations is a debate for another paper.

However, setting aside policy, one is left to wonder how the notion of adequate disclosure squares with the notion that the fiduciary obligation is owed to both present and prospective (i.e., non-original) owners. Clearly, disclosure cannot be given to, and consent cannot be obtained from, unknown prospective purchasers. While registration of a charge may solve that problem, in many cases the charge in question is not registered.

Nevertheless, full and accurate disclosure of what an owner developer intends to do upon deposit of the strata plan may be the least risky option for a developer seeking to "sell" parking stalls and storage lockers.

f. The Problem with Leased Common Property

It should be noted that this section of this paper relates only to leases entered into prior to deposit of the strata plan. As I hope will become obvious, the concerns raised here will not apply to leases entered into after deposit of the strata plan.

It should be noted that this section is not supported (or refuted) by any court decisions or judicial commentary. As such, the correctness of the conclusions is far from certain. Nevertheless, given the value of parking stalls, it seems inevitable that this argument will be adjudicated upon.

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44 *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc., supra*, at para. 30.

45 *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*, 2009 BCCA 36.

When read together, ss. 244 and 253 of the *Strata Property Act* provide that a lease of common property cannot pre-date the establishment of the strata corporation.

Section 244 of the *Strata Property Act* provides:

> 244 ...
>
> (2) Parking stalls, garage areas, storage areas and similar areas or spaces intended to be used in conjunction with a residential strata lot must not be designated as separate strata lots but must be included as part of a strata lot or as part of the common property.

Section 253 of the *Strata Property Act* provides:

> 253(1) A disposition of common property by way of any of the following is a subdivision of land and Part 7 of the *Land Title Act* applies to that subdivision:
>
> (a) a transfer of a freehold estate;
>
> (b) a lease for a term exceeding 3 years;
>
> (c) an interest that confers or may confer a right to acquire a freehold estate or a lease exceeding 3 years.
>
> ...
>
> (4) When common property is subdivided, it ceases to be common property and becomes land held in the name of or on behalf of the strata corporation but not shown on the strata plan.

As:

(a) a parking stall intended to be used in conjunction with a residential strata lot must be common property;

(b) a lease of common property for a term exceeding 3 years is a subdivision; and

(c) when common property is subdivided, it ceases to be common property,

one may conclude that a lease over a common property parking area, registered prior to deposit of the strata plan, precludes the parking stalls in that area from ever being common property. This may run afoul of s. 244 of the *Strata Property Act*.

One may argue that such an arrangement is not contrary to the *Strata Property Act* because the parking stalls would still be common property; they would just be common property subject to a lease. However, the *Strata Property Act* is clear that when common property is leased for a term of over three years, it is no longer common property. It is "land held in the name of or on behalf of the strata corporation but not shown on the strata plan."[46] The lease changes the very nature of the property. This scheme is not an example of simultaneous events (i.e., creation of the common property and a simultaneous subdivision thereof). The registration of the lease would pre-date the establishment of the strata corporation. As a result, the parking area would never become common property, as required by s. 244.

If the lease is unregistered, the remedy would likely be a declaration the common property is not bound by the lease. In effect, the lease will be deemed to have terminated upon deposit of the strata plan.

Where the lease was registered prior to deposit of the strata plan, the remedy is less clear. The *Strata Property Act* does not contain a provision that would render the lease invalid. An owner would perhaps have a claim against the owner developer or lessee for return of any monies paid for

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46 *Strata Property Act*, s. 253(4). I note that this is one of the definitions of a "common asset" under s. 1.

a parking stall. The strata corporation may be able to seek an order declaring the lease void. This would lend weight to any owner's claim for return of many paid for a parking stall. Additionally, the strata corporation and/or individual owners may have a claim against the Land Title and Survey Authority for accepting the strata plan for deposit without first requiring the discharge of the lease.

g. Location of the Parking Stalls

Irrespective of the foregoing, the location of the parking stalls and the date on which the lease was entered into are critical.

In *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (C.A.) ["*Top Line*"], the Court of Appeal held that s. 73 of the *Land Title Act* renders any lease of over three years void *ab initio* if it does not comply with Part 7 of the *Land Title Act*. Part 7 requires, among other things, that a subdivision plan be filed with the land title office.

This is highly relevant to leases of common property, as s. 253 of the *Strata Property Act* provides that a lease of common property is a subdivision and Part 7 of the *Land Title Act* applies to it.

Section 73(3) of the *Land Title Act* carves out an exception for leases of a building or part of a building. In effect, that section provides that such leases need not comply with Part 7.

While many leases are in relation to common property that is part of a building, there are many that are not. This is particularly so in older buildings. Where the parking area is a paved, ground level space, any lease over it with a term over three years likely must comply with Part 7 of the *Land Title Act*.

The Legislature responded to the *Top Line* decision by adding s. 73.1 to the *Land Title Act*. That section came into force May 31, 2007. It provides:

> 73.1(1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that
>
> (a) the lease or agreement for lease does not comply with this Part, or
>
> (b) an application for the registration of the lease or agreement for lease may be refused or rejected.

As a result, leases of part of a parcel of land are not deemed unenforceable merely because of non-compliance with Part 7.

Section 73.1 is not a foolproof solution. As noted by Macaulay J. in *Marine Masters Holdings Ltd. v. Greater Victoria Harbour Authority*, 2009 BCSC 953:

> [39] In any event, s. 73.1 does not operate as an exemption from the requirements of s. 73 whether past, present or future. It does not relieve parties from the obligation to comply with s. 73. Rather, it states that non-compliance does not render a lease unenforceable as between the parties to the lease. The single statutorily mandated, as opposed to judicially mandated, consequence of non-compliance with s. 73, namely the inability to register the lease in the Land Title Office, remains in effect under s. 73(6) regardless of s. 73.1.
>
> [40] I return here to s. 20 of the *LTA* which states that an unregistered instrument does not pass an estate or interest in land "except as against the person making it." In my view, in s. 73.1, the legislature clarifies the intended effects of s. 73 and s. 20. Non-compliance with s. 73 means a lease cannot be registered (s. 73(6)); an unregistered lease does not grant the lessee a legal or equitable interest in land except as against the lessor (s. 20).
>
> [41] Section 73.1 ensures that the failure to comply with s. 73 does not impose consequences beyond the inability to register with the Land Title Office. That

> consequence does not preclude the existence and enforcement of contractual *in personam* rights between to a lease.

The issues with unregistered leases have already been discussed. An additional problem posed is the fact that s. 73.1 provides the lease is not unenforceable *between the parties to the lease*. The section says nothing about successors in title. In addition to the problem of an unregistered lease, s. 73.1 may not save a lease where one party to the lease (the landlord) has divested its interest in the property. Of course, where the lease is entered into by the strata corporation after deposit of the strata plan, s. 73.1 will function as intended.

Further complications arise from the Court of Appeal's decision in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2010 BCCA 460 ["*Idle-O*"].

In *Idle-O*, the court was asked to determine whether s. 73.1 operates retrospectively. The court determined it does not. Leases for a term of over three years entered into prior to May 31, 2007 cannot be saved by s. 73.1.

Irrespective of any other legal arguments, one must ask the following to determine the validity of a parking lease:

(1) If the lease is not registered, is the strata lot owner or strata corporation a party to the lease?

(2) Is the parking stall part of a building?

(3) If not, was the lease entered into on May 31, 2007 or later?

It should be noted that, if the answer to question 1 is 'yes,' one would still have to consider the discussion concerning unregistered leases. In particular, the unresolved issue of whether an unregistered lease may be binding on the strata corporation, but not a strata lot owner.

IV. Conclusion

While none of the issues raised in this paper are as a result of the amendments to the Information Certificate, it is the Information Certificate that will cause them to come into focus for many strata corporations, property managers and strata lot owners.

So long as parking stalls continue to be valuable assets for reasons of both sale and ongoing revenue streams, developers and their solicitors will continue to look for ways to realize on those assets. These issues are not going away.

Many of the issues surrounding a leasing scheme for parking stall allocation arise because of an apparent attempt to avoid the fiduciary obligation that arises upon deposit of the strata plan, and the desire to avoid property transfer tax.

Developer's lawyers must choose carefully the parking stall allocation method that best suits their client's needs. They must also be clear in advising their clients of the issues with that chosen method.

Until the courts hear cases that require them to comment on the issues raised in this paper, strata corporations, property managers, real estate agents, owners, buyers, and lawyers would be well advised to proceed with caution in making unqualified statements as to parking stall and storage locker allocation.

In the meantime, expect to see more Form B's simply crossed out, thus leaving buyers in the dark as to what they are really acquiring and the benefits of an the amendments unrealized.

V. Schedule A—Information Certificate

Strata Property Act

Form B
Information Certificate

(Section 59)

The Owners, Strata Plan .....*[the registration number of the strata plan]* certify that the information contained in this certificate with respect to Strata Lot ..... *[strata lot number as shown on strata plan]* is correct as of the date of this certificate.

[Attach a separate sheet if the space on this form is insufficient].

(a) Monthly strata fees payable by the owner of the strata lot described above $.....

(b) Any amount owing to the strata corporation by the owner of the strata lot described above (other than an amount paid into court, or to the strata corporation in trust under section 114 of the *Strata Property Act*) $.....

(c) Are there any agreements under which the owner of the strata lot described above takes responsibility for expenses relating to alterations to the strata lot, the common property or the common assets?
☐ no ☐ yes *[attach copy of all agreements]*

(d) Any amount that the owner of the strata lot described above is obligated to pay in the future for a special levy that has already been approved. The payment is to be made by .....*[month day, year]*. $.....

(e) Any amount by which the expenses of the strata corporation for the current fiscal year are expected to exceed the expenses budgeted for the fiscal year $.....

(f) Amount in the contingency reserve fund minus any expenditures which have already been approved but not yet taken from the fund $.....

(g) Are there any amendments to the bylaws that are not yet filed in the land title office?
☐ no ☐ yes *[attach copy of all amendments]*

(h) Are there any resolutions passed by a 3/4 vote or unanimous vote that are required to be filed in the land title office but that have not yet been filed in the land title office?
☐ no ☐ yes *[attach copy of all resolutions]*

(i) Has notice been given for any resolutions, requiring a 3/4 vote or unanimous vote or dealing with an amendment to the bylaws, that have not yet been voted on?
☐ no ☐ yes *[attach copy of all notices]*

(j) Is the strata corporation party to any court proceeding or arbitration, and/or are there any judgments or orders against the strata corporation?
☐ no ☐ yes *[attach details]*

(k) Have any notices or work orders been received by the strata corporation that remain outstanding for the strata lot, the common property or the common assets?
no yes *[attach copies of all notices or work orders]*

(l) Number of strata lots in the strata plan that are rented .....

(m) Are there any parking stall(s) allocated to the strata lot?
☐ no ☐ yes

(i) *If no, complete the following by checking the correct box.*

☐ No parking stall is available

☐ No parking stall is allocated to the strata lot but parking stall(s) within common property might be available

(ii) *If yes, complete the following by checking the correct box(es) and indicating the parking stall(s) to which the checked box(es) apply.*

☐ Parking stall(s) number(s) ..... is/are part of the strata lot

☐ Parking stall(s) number(s) ..... is/are separate strata lot(s) or part(s) of a strata lot ..... [*strata lot number(s), if known, for each parking stall that is a separate strata lot or part of a separate strata lot*]

☐ Parking stall(s) number(s) ..... is/are limited common property

☐ Parking stall(s) number(s) ..... is/are common property

(iii) *For each parking stall allocated to the strata lot that is common property, check the correct box and complete the required information.*

☐ Parking stall(s) number(s) ..... is/are allocated with strata council approval*

☐ Parking stall(s) number(s) ..... is/are allocated with strata council approval and rented at $ ..... per month*

☐ Parking stall(s) number(s) ..... may have been allocated by owner developer assignment

Details:

.....

.....

.....

[*Provide background on the allocation of parking stalls referred to in whichever of the 3 preceding boxes have been selected and attach any applicable documents in the possession of the strata corporation.*]

***Note: The allocation of a parking stall that is common property may be limited as short term exclusive use subject to section 76 of the *Strata Property Act*, or otherwise, and may therefore be subject to change in the future.**

(n) Are there any storage locker(s) allocated to the strata lot?

☐ no ☐ yes

(i) *If no, complete the following by checking the correct box.*

☐ No storage locker is available

☐ No storage locker is allocated to the strata lot but storage locker(s) within common property might be available

(ii) *If yes, complete the following by checking the correct box(es) and indicating the storage locker(s) to which the checked box(es) apply.*

☐ Storage locker(s) number(s) ..... is/are part of the strata lot

☐ Storage locker(s) number(s) ..... is/are separate strata lot(s) or part(s) of a separate strata lot ..... [*strata lot number(s), if known, for each locker that is a separate strata lot or part of a separate strata lot*]

☐ Storage locker(s) number(s) ..... is/are limited common property

☐ Storage locker(s) number(s) ..... is/are common property

(iii) *For each storage locker allocated to the strata lot that is common property, check the correct box and complete the required information.*

☐ Storage locker(s) number(s) ..... is/are allocated with strata council approval*

☐ Storage locker(s) number(s) ..... is/are allocated with strata council approval and rented at $ ..... per month*

☐ Storage locker(s) number(s) ..... may have been allocated by owner developer assignment

Details:

.....

.....

.....

[Provide background on the allocation of storage lockers referred to in whichever of the 3 preceding boxes have been selected and attach any applicable documents in the possession of the strata corporation.]

***Note: The allocation of a storage locker that is common property may be limited as short term exclusive use subject to section 76 of the *Strata Property Act*, or otherwise, and may therefore be subject to change in the future.**

Required Attachments

In addition to attachments mentioned above, section 59 (4) of the *Strata Property Act* requires that copies of the following must be attached to this Information Certificate:

☐ The rules of the strata corporation;

☐ The current budget of the strata corporation;

☐ The owner developer's Rental Disclosure Statement under section 139, if any; and

☐ The most recent depreciation report, if any, obtained by the strata corporation under section 94.

Date: ..... [*month, day, year*].

.....
Signature of Council Member

.....
Signature of Second Council Member (not required if council consists of only one member)

OR

.....
Signature of Strata Manager, if authorized by strata corporation.