To stimulate interest and create an environment of communication and trust between boards and owners, information concerning issues to be dealt with at meetings must be provided to all owners at the time notice of the meetings is given.

Since the condominium concept is predicated on decision-making by the owners, it seems only reasonable that any choices made by them be informed ones. For instance, where a vote is put to the owners, they should have the opportunity to study the background information submitted. This approach coincides with the principle of full and open disclosure and communication between owners and boards.

Recommendation No. 68:
The corporation provide with the notice of meeting any background information regarding decisions being put to the owners for approval or a vote.

Removal of board members
Subsections (7) and (7a) of Section 9 of The Condominium Act deal with the removal and replacement of members of the board of directors. These subsections were enacted in 1975 to establish a procedure which could apply to all condominium corporations where the members had either a vacancy on the board or wanted to remove a member of the board.

Subsection (7) enables the majority of a board of directors to appoint a replacement where a vacancy on the board occurs. Subsection (7a) enables owners who own a majority of the units to remove a member of the board of directors before the expiry of his term and replace him.

There are two problems which might arise from the reading of these two subsections together. First, if a member of the board is removed in accordance with subsection (7a), the board may view it as a vacancy and replace the removed director under subsection (7).

Recommendation No. 69:
The Condominium Act be amended to clarify that:

A. Where a member of the board of birectors is removed pursuant to Section 9(7a), that this not be considered a vacancy in the board under subsection (7).

Second, if a director is removed from office by a vote of owners representing a majority of the units, his replacement will be elected by that same voting majority, where the corporation's by-laws may stipulate a different majority for election of board members.

B. When a board member is removed in accordance with Section 9(7a), a new member be voted into office by the owners in compliance with the corporation by-laws dealing with election of directors.

Voting requirements
Before proceeding further in this chapter, it is important to clarify the definition of owners and members. Throughout The Condominium Act there are ongoing references to owners and members. The term "owners" is defined in Section 1(1) of the Act "as owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee in possession". Section 9(1) of the Act states that the registration of a declaration and description creates a corporation without share capital whose members are the owners from time to time.

It has become the custom for these words to be used interchangeably, yet some sections refer to "owners consenting" and others refer to "meetings of members". Members may make by-laws, make substantial additions or changes to common elements, and terminate management control, while owners may vote for repair after damage, authorize sale of the property, and authorize termination of the condominium. This dual use of terms has led the Study Group to consider a possible problem. The mortgagee under Section 22 of The Condominium Act has the right of an owner to vote or consent, but a mortgagee does not necessarily have the rights of a member. If the mortgagee does not have the rights of a member, it is possible that he may not have the right to vote on by-laws.

There is no reason for continuing to use the dual terms; in fact, continued use of the terms could lead to a dispute.

Recommendation No. 70:
The Condominium Act be amended to use only the term "owners" and not "members" in specifying rights and obligations.

Section 14(1) of The Condominium Act provides that 80 per cent of the members of the corporation are required to vote in favour of a "substantial addition, alteration, improvement or renovation of the common elements or corporation assets". A change which is not substantial requires only a majority vote of the members.

Some condominium documents state that the Board can determine what is substantial; others do not deal with the matter at all.

Due to the condominium corporations' variety of size and services provided, it is impossible to arrive at any formula that would apply equitably in all situations, and to give Boards a universal definition of what constitutes "substantial".

Legislation often contains words such as "reasonable" and "substantial" because of the inherent difficulties in creating a standard which can apply in all circumstances. The nature of condominium decision-making, however, demands greater certainty for those involved in the process.

Recommendation No. 71:
The Condominion Act be amended to provide that the Board of Directors of a condominium corporation may determine what constitutes a "substantial" change in common elements or assets.

Responsibility should lie with the Board to consider any change in relation to a percentage of either annual operating costs or accumulated reserve funds. As well, it should consider factors such as continuing expense to the corporation and the overall effect on owners in deliberating on what is substantial. While the right to decide this issue should rest with the Board, it must notify the owners of its decision, and the owners should have a right to call a meeting to overturn such a decision, in accordance with Section 9a(3). This fits in with a later recommendation that 15 per cent of the owners can request a meeting and a decision can be made by more than 50 per cent of the owners present or by proxy.

Voting majorities
One of the most frequent concerns expressed at the public hearings by condominium owners was their inability to amend the declaration, by-laws, and rules and regulations (a guide to the percentage majority currently required to affect particular votes is in Chart 7).

This voting procedure requires that the vote of each person be calculated in accordance with his percentage of ownership interest as set out in the declaration; once all the votes are calculated, a total of votes of all the ownership interests in favour is required to approve a change. This procedure is cumbersome and time-consuming, and it negates the principal of secret balloting.

Chart 7

Matters contained in The Condominium Act and votes required

Section	*Purpose of Vote or Consent*	*Percentage Majority Required*
3(3)	To amend declaration	100% of owner and encumbrancers
8a(1)	Granting leases or easements	Members who own 66-2/3 of the common elements
7a	Removal of director	Members who own a majority of units
9a(3)	Calling of meetings	Members who own 25% of the common elements
10(1)	Making by-laws	+Members who own 66-2/3 of the common interests
11(1)	Making rules	Members who own majority of units
14(1)	To make substantial alterations to common elements	+Members who own 80% of common interests
14(1)	Making non-substantial additions or alterations to common elements or assets of the corporation	Majority of members
15a	Termination of management agreement	Members who own 66-2/3 of common elements
17(2)	Vote to repair where damage over 25% of the buildings	+Owners who own 80% of common elements
19(1)	Sale of property or part of common elements	+Owners who own 80% of common elements and 100% signature on deed
20(1)	Termination of government	+Owners who own 80% of common elements and 100% signature on notice of termination

+or such greater percentage as is specified in the declaration or by-laws

Recommendation No. 72:
The Condominium Act be amended to provide that:

A. Voting be on the basis of one vote per unit, rather than on the total of percentage interests.

B. Where there is more than one owner of a unit, only one owner can vote.

Declaration
An amendment to the declaration requires 100% consent of the owners and mortgagees or an order of a judge of the County or District County; the court application is only of assistance if the change being sought is to correct a manifest error or inconsistency in the declaration. Since there is a mechanism available for court resolution, this chapter deals primarily with changes by voting majorities.

The court application is made on at least seven days notice to the corporation, to every other unit owner and to the judge. If he is satisfied that an amendment is necessary, he may make an order. Unfortunately, there is no requirement that encumbrancers of the units and common elements be notified of the application. As it is probable that the judge will insist that they be notified as a condition of the order, the lack of requirement for such notice in the Act may be misleading.

Recommendation No. 73:
The Condominium Act be amended to require notice to encumbrancers of an application to amend the declaration or the description because of a manifest error or inconsistency.

When an individual purchases a condominium unit, he does so with the knowledge that certain matters governing the corporation are basically secure for all time. An owner who purchased a unit knowing that he was entitled to a 2 percent interest of the corporation might be adversely affected if the other owners were able to change his ownership interest to 1.2 percent without his concurrence. For this reason, there should be no change in the unanimity requirement for an amendment to the declaration. The voting majorities for the declaration should remain intact, but to alleviate the problems now facing the corporations, certain items currently dealt with in the declaration and by-laws should be moved from the declaration to the Act or by-laws, provisions should be standardized where possible, and the number of items currently included in condominium declarations should be reduced.

Recommendation No. 74:
The Condominium Act be amended to eliminate the inclusion in the declaration of those items which would be better dealt with in the Act or the by-laws.

The following are the sections of the Act. Beside each of the paragraphs it is indicated where the item should be appropriately dealt with.

Existing:	Recommendation:
3.(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains,	
(a) a statement of intention that the land and interests appurtenant to the land described in the description governed by this Act;	Unchanged
(b) the consent, in the prescribed form, of every person having a registered charge, mortgage, lien or other claim securing the payment of money against the land or interests appurtenant to the land described in the description, other than a municipality having a registered agreement with the owner of the land described in the description or with any predecessor in title of the owner;	Eliminate (b)
(c) a statement, expressed in percentage, of the proportions of the common interests;	Unchanged
(d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expense; and	Unchanged
(e) an address for service, R.S.O. 1970, c.77, s.3(1); 1974, c.133,s.2(1)	Add the words: "and a municipal address for the corporation, if different".
(2) In addition to the matters mentioned in subsection 1, a declaration may contain,	
(a) a specification of common expenses;	Unchanged
(b) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners;	(b) becomes s.3(1) (f)
(c) provisions respecting the occupation and use of the units and common elements;	Unchanged
(d) provisions restricting gifts, leases and sales of the units and common interests;	Unchanged

(e) a specification of the number, qualification, nomination, election, term of office, compensation and removal of members of the board, and the meetings, quorum, functions and officers of the board;	To be included in the by-law
(f) a specification of duties of the corporation consistent with its objects;	Unchanged
(g) a specification of the majority required to make by-laws of the corporation	Unchanged where the corporation is less than 9 units; otherwise to be included in statute
(h) provisions regulating the assessment and collection of contributions towards the common expenses;	(h) to be included in the by-law
(i) a specification of the majority required to make substantial changes in the common elements and the assets of the corporation;	To be included in statute
(j) a specification of any provision requiring the corporation to purchase the units and common interests of any dissenters after a substantial addition, alteration or improvement to or renovation of the common elements has been made or after the assets of the corporation have been substantially changed;	Unchanged
(k) a specification of any allocation of the obligations to repair and to maintain the units and common elements;	Unchanged
(l) a specification of the percentage of substantial damage to the buildings and a specification of the majority required to authorize repairs under section 17;	To be included in statute
(m) a specification of the majority required for a sale of the property or of part of the common elements;	To be included in statute
(n) a specification of the majority required for the termination of the government of the property by this Act; and	To be included in statute
(o) any other matters concerning the property.	

By-law

Voting procedure related to changing the by-laws require simplification to ensure that condominium corporations comply with them and to encourage participation of unit owners. Currently, an amendment to the by-laws requires a 66-2/3 per cent vote of the ownership interest. There are two existing problems with this requirement.

First, many condominium corporations are finding that it is virtually impossible to hold a meeting where a 66-2/3 per cent vote can be obtained, either in person or by proxy. Apathy is one of the greater difficulties facing Ontario's condominiums. Thus the current 66-2/3 per cent vote requirement hampers many corporation boards from effectively managing the corporation.

Recommendation No. 75:
The Condominium Act be amended to provide that the voting majority to amend by-laws be reduced to a vote in favour of the by-laws or amendments thereto of more than 50 per cent of the owners of all the units.

Second, The Condominium Act, in defining various voting majorities, uses such phrases as "members who own 66-2/3 per cent per cent . . . of the common elements . . . ". This usage of the term "common elements" appears to be incorrect, as in Section 7(2) an undivided interest in the common elements is appurtenant to each unit and therefore a member would vote his share in 100 per cent of the common elements. The "common elements" is the property. The "common interests" are the percentage interests in the common elements appurtenant to a unit. No recommendation is needed as the one vote per unit recommendation will rectify the situation.

The reduced voting majority to amend by-laws will not be detrimental to those seeking security in their documents. This will be coupled with recommendations concerning standardizing documents, where possible, including current by-law provisions in the Act, and moving some of the by-law provisions into the rules and regulations.

The foregoing recommendations will only give the desired results if the recommendation concerning standardization of documents is also accepted (see chapter on Registrar).

Rules and regulations

The purpose of rules and regulations is to prevent unreasonable interference with the use and enjoyment of the units and common elements. The Condominium Act allows a corporation to make rules and regulations respecting the use of common elements only if such a provision is included in the by-laws. Currently, in order to pass such rules and regulations, a vote of more than 50 per cent of the owners is required. Some developers fail to include this provision.

Many boards of directors are unable to function effectively because of continually having to resort to voting majorities which are impractical, given the issues to be decided by the owners.

Recommendation No. 76:
The Condominium Act be amended:

A. To remove the requirement that a provision regarding the enacting of rules and regulations be included in the by-law.

B. To provide that all corporations have the power to pass rules and regulations which are reasonable and consistent with the Act, declaration and by-laws of the corporation.

The provision for the making of rules in the current Act allows them to be made only "respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements".

Unfortunately, this means that the condominium corporation cannot pass rules relating to the use of units so as to eliminate noise or other sources of interference with other units. In an equivalent rental project, the landlord would be able to enforce rules against noise for the benefit of other tenants. The condominium owner does not now have the right to look for this protection from the condominium corporation.

Arguments may be made that the condominium corporation should not interfere with an owner's behaviour within his own unit unless this regulation is done by by-law with the consent of the owners. The counter-argument is that it is necessary for the corporation to react quickly to prevent new abuses, which can have a profound effect on the owners due to the high density and close interaction in the project.

Recommendation No. 77:
The Condominium Act be amended:

A. To eliminate Section 10(1) (b) regarding by-laws governing the use of units for the purpose of preventing unreasonable interference with the use and enjoyment of common elements and the units.

B. To allow rules "respecting the use of the units and common elements for the purpose of preventing unreasonable interference with the enjoyment of the units and common elements".

Matters dealt with by rules and regulations can properly be dealt with by members of the board. In our literature search of other jurisdictions, we discovered that few, if any, corporations are required to put matters before the unit owners that were dealt with by rules and regulations. Due to the general apathy of owners and the need to allow the corporation to govern itself through elected representatives, members of the board should have the authority to enact rules and regulations. We do feel, however, that a safeguard measure is necessary.

Recommendation No. 78:
The Condominium Act be amended:

A. To permit the Board of Directors to make rules and regulations.

B. To eliminate the requirement that 50 per cent of the owners vote in favour of a rule or regulation.

C. To require the Board to notify unit owners 30 days in advance of a rule or regulation becoming effective and, where necessary, to explain the effect of the rule or regulation.

Recommendation No. 79:
The Condominium Act be amended to reduce the percentage required to call a meeting of owners for any purpose to 15 per cent of unit owners.

Recommendation No. 80:
The Condominium Act be amended to require a vote of more than 50 per cent of the owners of all the units to overturn a decision of the board of directors concerning rules and regulations.

If the owners object to a rule or regulation and 15 per cent of them petition the board for a meeting, the board must either call a meeting in accordance with Section 9a(3) to deal with the issue, or postpone enactment of the rule or regulation until the issue can be dealt with at a general meeting. When a meeting is called to deal with the matter, an opposing vote of more than 50 per cent of the owners of all the units will be required to defeat the proposed rule or regulation.

Condominium owners also have the additional safeguard of the right to remove a member or members of the Board by a vote of more than 50 per cent of the owners. Section 9(7a) of the Act gives the owners this right.

Correction of voting majority requirements alone, however, will not remove all problems related to requirements for members' consent. Section 19 of The Condominium Act allows sale of the property or any part of the common elements, resulting from the authorization of a vote of owners who own 80 per cent, or such greater percentage as is specified in the declaration, of the common elements, and the consent of the persons having registered claims against the property.

However, a deed or transfer must be signed by all the owners and a release of claim or discharge must be signed by all the persons having registered claims against the property. This negates the value of having a less than 100 per cent voting requirement.

A method of disposing of all the property is recommended in the chapter on Termination. A less drastic method of disposing of property is desirable for the sale of a part of the common elements.

Recommendation No. 81:
The Condominium Act be amended so that the signing officers of the corporation can certify as to the authorization by the required majority of a sale of part of the common elements and sign the deed or transfer resulting from this.

Renting of units
Throughout the course of the hearings, briefs were presented dealing with rentals in condominium projects and the problems created when owners and non-owners are living together in a condominium community. The rental of units occurs in three situations:
a) developers leasing units
b) speculators purchasing and then leasing units
c) owner-occupiers leasing units

Developers' leasing of units
In 1975, The Condominium Act was amended to include Section 24d, which prohibits a developer from leasing unsold units in a condominium project unless the lessee has entered into a bona fide agreement of purchase and sale; or the lessee has a bona fide option to purchase; or every agreement of purchase and sale entered into by the developer includes a statement of the developer's intention to lease units; or written notice of a developer's intention to lease is given to everyone who has signed n agreement of purchase and sale, every registered owner and lender is entitled to vote, and no objection has been made to the court under Section 24d(2). These provisions are alternative in their application rather than cumulative.

In the present condominium market many developers are unable to sell some of the condominium units they are building. In order to have a financially viable condominium corporation, those units in the developer's ownership must be able to generate income. Sometimes, a developer's inability to pay his share of the common expenses and carrying charges because of unsold units he is forced to carry, can lead to financial hardship for both the developer and corporation. To avoid this eventuality, many developers are forced to lease the units, provided they do so in compliance with Section 24d, they are entitled to do so. It should be noted that a developer who fails to comply with subsections of Section 24d can be found guilty of an offence under Section 24e of The Condominium Act and be subject to the penalty of up to $25,000 where a person is a corporation, and up to $2,000 if the person is other than a corporation.

Any attempt to further restrict the developer's right to lease unsold units would be of little assistance to either the development industry or the unit purchasers. Any further restriction of this nature on the developers would create greater difficulties than it would resolve.

Speculators' leasing of units
One condominium corporation which presented a brief complained that 25 per cent of their corporation's units were owned by a group of speculators who rent out the units. The owner-occupants felt that they were severely hampered by this situation because the tenants did not have the same interest as the owners. The speculator-owners did not exercise their right to vote. Where a corporation is unwilling to draw on tenants or tenants are unwilling to participate, it is possible that the resource base for drawing members to the Board of Directors may be small. These matters combined lead to problems for the condominium corporation.

Some lenders, including government lenders, insist that the purchasers occupy their units for a fixed period of time after registration before they are permitted to sell. A purchaser's failure to occupy the unit for a specified time period constitutes a default under the mortgage. The mortgage lenders, in co-operation with the buiders and perhaps, as part of the mortgage commitment, could control the bulk sale of units to any one group or individual. The controls could be beneficial to both owner-occupier and lender. Owner-occupiers will be less likely to find themselves in a corporation where large blocks of units are owned by speculators. The lender's investment is better protected in a project where the units are occupied by the owners, a situation which is more likely to produce a smooth-running corporation.

Owner-occupiers' leasing of units
Although a few condominium corporations submitted briefs which dealt with the renting of units by owners and although many of these briefs recommended some form of control over this practice, few actually suggested that owners be prohibited from leasing their units.

Although condominium ownership differs in many respects from single-family home ownership, the basic philosophy concerning the right to rent applied to both.

Recommendation No. 82:
A unit owner's right to lease his unit should remain intact.

In the three situations where the rental of a unit may occur, certain precautions are necessary to protect the interests of the condominium corporation. Many corporation's briefs suggested that a standard form of lease be recommended for all condominium unit leases to insure that all tenants were bound by their obligations and responsibilities under The Condominium Act. A standard form of lease is unnecessary, however, as Section 23(2a) states the tenants' obligations and the corporation's right to enforce them against the tenants.

To assist the condominium corporation and owners and tenants who may reside therein, certain amendments to The Condominium Act remain necessary.

Recommendation No. 83:
The Condominium Act be amended:

A. To provide that an owner who rents his unit give notice of the rental to the Board of the condominium corporation.

B. An owner's failure to notify the Board of his intention to lease his unit be the subject of a penalty under Section 24e of The Condominium Act (Maximum penalty of $2,000 to an individual and $25,000 to a corporation).

The recommendation should achieve a dual purpose. First, the corporation will be made aware of who is living in the project; second, the corporation will be able to communicate with tenants advising them of the guidelines within which both tenants and owners are required to live.

Some condominium corporations find rentals are not a problem because of their policy of meeting with new tenants, providing them with the condominium documentation and welcoming them into the project. Many owners in these corporations also felt confident enough in their tenants to give them proxies allowing them to vote in condominium meetings. Those who do not have such confidence in their tenants might wish to give their proxies to the Board.

Condominium corporations experiencing additional costs as a result of the extra administration and possible damage resulting from high-tenant occupancy also must be assisted.

C. The common expense fees for leased units be increased by 10 per cent.

Division of units and common elements
Assessment of leased common elements
The Condominium Act, Section 7(11), explicitly precludes the separate assessment and taxation of common elements. Each unit is assessed as an entity with the assessed value largely a function of unit sales. To the extent that there is any market value for the common elements, it is reflected in the sale prices and thus, indirectly, in the assessment.

A recent amendment to The Condominium Act, Section 8(a)1, permits the corporation to lease part of the common elements. It is our contention that Section 7(11) of The Condominium Act overrides Section 17(2) of the Assessment Act which provides for the separate assessment of each subdivision of land. Therefore, commercial tenants in common elements are exempt from business assessment. In addition, the occupants of such leased areas cannot be enumerated for municipal election purposes.

A possible solution to the problem is to make the tenant, not the corporation, liable for payment of the business tax. An amendment to the legislation would facilitate the enumeration of the tenant for electoral and school support purposes.

Recommendation No. 84:
The Condominium Act be amended to permit the assessment of leased common elements for business tax.

Division of units
A parallel problem exists with respect to Section 24(1) of The Condominium Act. That section says that Section 29 of The Planning Act, which says that property may not be divided without going through the procedures in The Planning Act, does not apply to dealings with units and common interests. Some unit owners have interpreted this as meaning they can divide a unit and sell part of it. This is not the intent of the section which was merely to allow property to be divided by the Condominium Act, not the Planning Act.

Recommendation No. 85:
The Condominium Act be amended to clarify that division within units is subject to Section 29 of The Planning Act.

Reserve fund as an adjustable item
A properly functioning condominium corporation should be building a reserve fund from its inception to be used for the repair and replacement of capital items. The money collected for the reserve fund comes from the unit owners' common expense payments.

Once paid to the corporation, the funds become an asset of the corporation. Much controversy has arisen over whether a unit owner is entitled to an adjustment on his contribution when he sells his unit. Some owners feel that they should be entitled to a refund of their contribution from the condominium corporation itself.

Under no circumstances should a corporation repay to an owner his contribution to the reserve fund. Once those funds are received by the corporation they are an asset of the corporation and any payment for the above purpose would constitute an act beyond the scope of the corporation's authority.

The question of what constitutes an adjustable item in a real estate transaction, where the item has not been specifically mentioned in the agreement of purchase and sale, is dealt with in The Conveyancing and Law of Property Act R.S.O. 1970 C. 85. The Act does not deal with reserve fund contributions. In resale transactions, the matter of reserve fund adjustability has been determined by the lawyers representing the buyer and the seller. The seller's lawyer will endeavour to have the amount adjusted and the buyer's lawyer will attempt to ensure that it is not adjusted. If the offer of purchase and sale is silent on the matter, no adjustment should be made.

Recommendation No. 86:
The Condominium Act be amended to clarify that payments towards a reserve fund constitute an asset of the corporation and, as such, cannot be distributed to owners except on termination of the condominium corporation.

It follows from this that amounts in the reserve fund attributable to a particular unit should not be adjusted on closing. The place for a seller to recover these funds is in the sale price of his unit.

Taxation of interest earned on reserve funds
At several hearings, the question was raised about the tax status of interest on reserve funds. While all condominium corporation submissions commenting on this issue agreed that any income other than common expense payments is taxable, there was some question as to whether interest earned on reserve funds also is taxable.

The interest earned on money allocated to a corporation's property repair reserve fund is regarded by the Department of National Revenue as income earned from property. This income is taxable at the rate of 39 per cent after an initial deduction of $2,000 is made. (Department of National Revenue, *Interpretation Bulletin IT 83*, December 28, 1972).

The corporation can escape tax liability by rebating the interest earned to the owners. While this rebate would be regarded as interest income for the owners, the $1,000 interest deduction, for which each taxpayer is eligible, would effectively exempt most owners from the tax. The cost of administering such a rebate program, in the face of the small amounts involved for each owner, make the rebate alternative impractical for most corporations.

Several submissions requested the Study Group to recommend that the tax position of condominium reserve funds be reviewed by the federal government. A direct approach to the Department of National Revenue by condominium owners and associations is the most effective vehicle for requesting a review of the existing federal policy.

Chapter 11
Financial administration

There has been insufficient recognition by many condominium corporations of the fact that they are running significant business operations. Substantial increases in maintenance fees, unscrupulous developers and shoddy builders are not necessarily the cause of a corporation's financial problems. The key to successful management of a condominium is effective administration of the corporation's finances.

Annual budget

The centrepiece of the financial system, the annual budget, currently receives only limited attention in The Condominium Act. Throughout the Act, a number of sections imply the need for an annual budget and an expectation that the Board of Directors will prepare and administer a budget. Section 25 (1), empowers the Lieutenant-Governor in Council to "make regulations requiring and governing the accounting to members of condominium corporations in such manner and at such times as are prescribed". So far, no regulations have been made. The sole explicit reference in the Act to a corporation budget is section 24b (4), which was enacted in 1974 to eliminate "lowballing" of common expenses by developers.

Submissions from the Institute of Chartered Accountants, lawyers, management firms, developers and consumers remarked on the need for firmer guidelines in the preparation of financial statements.

The diversity of condominium corporations in size, design, and requirements of the declarations or by-laws has been a major factor inhibiting the proper analysis of budget statements. The financial reports submitted by condominium corporations varied considerably in completeness, and it is not feasible to comment on the adequacy of the statements without knowing more about the individual circumstances of the corporations.

There are, however, certain general comments that can be made regarding the coverage of financial statements. Each corporation should prepare annually a budget statement that identifies projected revenues from all sources, such as common expense charges, parking fees, lease revenue and interest. It should also identify the anticipated expenses. The major expense categories are utilities, insurance, maintenance, repairs, management fees and reserves.

Seldom will a budget year be completed with revenues and expenses behaving as forecasted when the budget is prepared, nor will the two amounts balance precisely. Consequently, there will be a surplus or deficit at the end of the year and the budget should make provision for this net cash flow or net income, either positive or negative.

The board should also, for purposes of improved control, allocate the annual revenues and expenses on a monthly or at least a quarterly basis.

The corporation should prepare a separate budget for the reserve or contingency fund that indicates how the money in the fund is earmarked or committed.

Before the annual general meeting, the board should circulate a balance sheet and a statement of income and expenses to the owners. These statements should be explained by the Treasurer and discussed by the owners at the meeting.

The balance sheet should identify major assets and liabilities for both the current operations and for the reserve fund. It is also helpful if comparative data is provided for the previous fiscal year.

The statement of income and expenses should identify any discrepancies between budgeted estimates and actual results, with explanations where appropriate.

As with the budget, boards will facilitate their control of the corporation if the balance sheet and the income/ expense statement are prepared on a monthly or quarterly basis. These statements should be audited by an independent auditor.

Condominium corporations should also consider the feasibility of appointing an audit committee to review financial statements and otherwise comment on the financial operations of the corporation. Appointment of an audit committee will facilitate involvement in the corporation's financial activities of those owners who because of their financial interest in the condominium corporation otherwise would be prohibited from acting as auditors.

Recommendation No. 87:
The Condominium Act be amended to provide:

A. That financial statements be provided to all owners prior to annual meetings.

B. By regulation, the minimum content of the statements.

Recommendation No. 88:
Condominium boards consider appointing audit committees to assist the board in managing the financial affairs of the corporation.

Reserve funds

While all condominium corporations that submitted briefs to the Study Group prepared budgets, only a minority made provision for owner contributions to a contingency or reserve fund that is used to finance the repair and replacement of major components of the common elements, such as roofs, roads, parking lots and elevators. More than one brief, in fact, was concerned with misuse of the reserve fund by the board to finance current expenses. An adequate reserve fund is essential for effective property management.

The purpose of the fund is to provide money necessary to maintain the common elements of the corporation at their original level; it is not to finance the improvement or expansion of the capital equipment owned by the corporation. If the owners agree that, for example, addition to the recreation facilities or remodelling of the entrance lobby is desirable, a separate capital reserve fund should be established.

Since the need to maintain common elements continues throughout the life of the corporation, it is necessary to maintain the reserve fund at an adequate level and replenish it when it is depleted by extraordinary expenditures. Corporations that have a reserve fund may be able to use it as security for raising a loan to finance major repairs that would otherwise seriously deplete the fund.

The reserve fund should be an integral part of the budget, the balance sheet and the income/expense statement. The budget statement for the fund should identify the capital items covered by the budget along with estimates of their replacement cost, their expected physical life and the annual allocation for the expense.

The corporations that do have reserve funds apply different formulae to fund them. Some calculate the amount to be contributed to the fund as a percentage of the total common expense requirement exclusive of reserve fund. Others base the contribution on the appraised value of the building. A third method, whereby the annual requirement of the reserve fund is based on the replacement cost of the major capital items, is the most appropriate.

While the other formulae may have the benefit of administrative convenience and do ensure that some money is available in the reserve fund, a fund which reflects the anticipated annual replacement expenditures is most likely to provide adequate funds at any one point in time.

Whichever method is selected, the owners' payments to the fund are made in the same proportion as their common expense payments. Those existing corporations without reserve funds will find it difficult to impose the "initial lump sum" contribution on the owners. The contribution should, nevertheless, be required and could be collected over a maximum twelve month period.

Recommendation No. 89:
The Condominium Act be amended to require

A. That all corporations have a reserve fund for the replacement of major capital items, the money to be deposited with a chartered bank or trust company in a trust account separate from the corporation operating accounts.

B. The developer establish the account in the corporation's name with an initial deposit equal to three months common expenses and transfer the account to the board of directors at the first annual meeting.

C. The annual contributions to the reserve fund be based on the cost and life expectancy of major capital items as disclosed by the developer or as modified by a subsequent appraisal.

Audited statements
The Condominium Act does not require the audit of financial statements of condominium corporations. While several corporations indicated in their briefs that their financial statements are audited, many more do not have their statements audited. This is a serious omission which severely restricts the ability of unit owners to obtain a comprehensive evaluation of the financial affairs of the corporation. The auditor reports to the owners on the financial operations of the corporation. He is, in effect, a financial watchdog over the Board of Directors. His background in accounting enables him to act as an advisor in preparing financial statements and managing the corporation's financial transactions.

The Business Corporations Act (sections 168, 169, 170 and 171), The Corporations Act (sections 62, 63 and 64, which are not yet proclaimed) and The Canadian Business Corporations Act (sections 155-164) all require the appointment of an auditor and deal with the responsibilities and authority of the auditor. These sections could act as a model for comparable provisions in The Condominium Act.

Audited financial statements should be required by statute. In addition to requiring the appointment of an auditor, the enabling legislation should identify who can be appointed, define the auditor's duties and describe the authority of the auditor, such as access to corporation records and attendance at board meetings. The requirement for an auditor should be optional for small corporations — those with less than 10 units where the assets controlled by the corporation are not large and the financial transactions are relatively few in number and simple in nature.

Recommendation No. 90:
The Condominium Act be amended to provide for the appointment of an auditor for each corporation of more than nine units. The auditor should have the authority and responsibility provided for auditors appointed under the Business Corporations Act.

Repair of unit
In The Condominium Act, the cost of the repair of a unit is not included as part of the common expenses. Section 16(7) states that although an owner is deemed to have consented to having repairs effected in his unit, there is no provision in the statute which enables the condominium corporation to recover the cost of these repairs; it is merely implied or included in condominium

Naturally the condominium corporation has the right to sue someone who causes damage but lawsuits are expensive and time-consuming.

Recommendation No. 91:
The Condominium Act be amended to allow the corporation to assess the cost of repairs, carried out by the corporation to a unit, as common expenses chargeable to the unit and collectable by way of lien.

Common expense funds
Common expenses are the costs incurred by a condominium corporation in maintaining the common elements of the property and in carrying out its legal obligations. Section 15b(4) of The Condominium Act states that all money received for the payment of common expenses relating to property shall be held in trust. The intention of this section was to ensure that a management firm receiving the money would do so on behalf of the corporation.

The possibility exists that a condominium corporation's common expense fund, if it is in the name of the management firm, might be converted to other uses. It is possible that the creditors of a management firm could seize funds in an account in the name of the management firm. It is also a matter of concern that a condominium corporation, whose funds are in an account in the name of the management firm, might be forced to bring a court action to recover monies rightfully belonging to it if the management firm were dismissed. These are not merely theoretical concerns as there have already been cases where such situations have threatened.

Recommendation No. 92:
The Condominium Act be amended to ensure that trust accounts created in accordance with Section 15b(4) are in the name of the condominium corporation.

It was suggested at public hearings that any cheque written on a corporation's trust account should be co-signed by at least one officer of the corporation. This is a sound policy.

Recommendation No. 93:
All cheques drawn on the corporation's trust account be co-signed by at least one officer of the corporation.

As condominiums have become more prevalent, a growing number of developers are including commercial space in their projects to provide amenities for the owners. Where commercial space, which forms part of the common elements of a corporation, generates income or the condominium corporation generates any income, this money becomes an asset of the corporation. Some confusion has arisen over what should be done with these funds. Should they be used to reduce common expenses, be added to reserve funds, or be paid out to the owners?

These monies should be retained in the corporation, rather than distributed to the owners. Condominium corporations should not be operated for profit purposes, as businesses are. Administratively, the paying out of this income to owners would be most difficult, and could lead to possible tax problems for the corporation and the owners.

Recommendation No. 94:
The Condominium Act be amended:

A. To define income other than income received from common expenses. (We recommend the term "common surplus".)

B. To provide that these monies be applied against either future common expense payments or reserve funds, but not be distributed to the owners unless there is termination of the condominium.

Common expense arrears
It became increasingly apparent with each public hearing that one of the major problems facing condominium corporations today is their inability to collect common expense payments assessed against unit owners.

The problems arise in three situations:

a) a unit owner decides not to pay because he feels the corporation is not carrying out its duties.
b) a unit owner is unable to pay his common expenses.
c) absentee owners who either knowingly or unknowingly fail to remit their payments.

A unit owner who fails to remit common expense payments because he is not satisfied with the way the corporation is performing its duties, does so without any legal basis. There is no provision in either The Condominium Act or a condominium corporation's documents which entitles a unit owner to withhold payments for any reason. A unit owner's failure to make his payments can jeopardize the cash flow of a corporation. If a failure to pay continues for any extended period of time, this could affect the remaining unit owners.

Condominium corporations in Ontario have been experiencing sharp increases in common expense assessments over the last few years. These increases are due to a variety of factors including lowballing, higher utility costs, construction problems, or mismanagement.

These condominium owners, who are unable to meet their payments, are the cause for greatest concern. If they have little equity in their unit, they may choose to just walk away and let the mortgage company and the corporation fight it out themselves (see chapters on Lending Institutions and Housing Choice).

Priority
Under current legislation, it is assumed that a first mortgage has priority for arrears on the mortgage over the corporation for arrears in common expense payments. In circumstances where the unit owner "walks away" from his unit and there is very little equity, if any, remaining, the condominium corporation, which ranks subsequent to the mortgage on a sale, will very likely recover none of the money owing to it. This loss of revenue to condominium corporations is a serious factor affecting the other unit owners who will, as a group, have to make up the operating and reserve deficit.

Recommendation No. 95:
The Condominium Act be amended to provide that a lien for unpaid common expenses has priority over all encumbrances except municipal taxes.

The Study Group appreciates the fact that many lending institutions will not react favourably to this recommendation. In many situations, where the market is temporarily slow, this may affect the mortgagee's ability to recover the full amount owing to it. The effect of this recommendation is that future condominium projects should be financed in such a way that buyers will be required to make larger down payments to protect the mortgagee's financial position (see chapter on Lending Institutions).

Tenants
The absentee owner who doesn't pay common expenses is also a cause for concern to the condominium corporation. While the absentee owner collects rent from his tenant, the corporation may find itself in cash flow difficulties because the common expense payments are not being made.

Recommendation No. 96:
The Condominium Act be amended to provide that where a tenant occupies a unit in a condominium, and that unit is in arrears of common expense payments, the corporation shall have the right to collect the common expense payments from the tenant, who will be entitled to deduct the amount paid to the corporation from the rent he pays the owner.

Interest
At present there is no provision in The Condominium Act that interest charged on common expense arrears and costs of collecting them should be included in the amount of lien and collectable in the same manner. The documentation of a majority of condominium corporations does provide for charging interest on arrears and for recovery of collection costs. There has been great uncertainty regarding the authority of these provisions in condominium corporation documents. It is our opinion that the corporation should not be charged with the costs of collection.

Recommendation No. 97:
The Condominium Act be amended to provide:

A. That interest may be charged on arrears and the cost of recovering common expense arrears be included as a common expense attributable to that unit.

B. By regulation, the rate of interest on common expense arrears be 12 per cent per annum.

There is a danger that such an amendment will encourage certain members of the legal profession to charge very high fees to unit owners for registering liens.

Recommendation No. 98:
The law associations consider establishing a suggested maximum fee to be charged for the registration of a common expense arrears lien.

Procedure for collection of common expense payments
Before legal action is taken by the corporation against a delinquent unit owner, the corporation should adopt a consistent method of collection. The following method, as an example, could be applied:

Ten days after the date the payment is due, a notice of arrears and request for payment should be sent to the delinquent unit owner.

If no payment is made within the next 15 days, the president of the board should send a second letter by registered mail.

If payment is not forthcoming within the next 10 days, the board should advise the property manager, if any, that they wish him to discuss the arrears with the unit owner.

Continued failure to remit payment should lead the board to turn the matter over to the corporation's counsel. The lawyer should be instructed to send a letter demanding immediate payment to the unit owner. If a unit owner still fails to pay, then the solicitor or agent of the corporation should register a lien against the unit for the arrears in common expenses.

Registration of a lien
To facilitate the collection of common expenses, Section 13(4) and (4a) of The Condominium Act provide that a corporation has an unregistered lien for three months. When registered in the Land Registry Office, this lien gives a corporation protection for three months worth of common expense arrears.

In Regulation 98 of The Condominium Act, Form 10 states that a lien secures any further defaults beyond the three months referred to in Section 13 (4a).

There is a conflict between Section 13 (4a) and Form 10. Since the statute supersedes the regulation, cautious corporations should be registering new liens for arrears every three months. Once a lien is registered it should cover all future defaults.

Recommendation No. 99:
The Condominium Act be amended to give statutory authority to Form 10 of Regulation 98 which allows the lien to secure future defaults.

Section 13 (5) of The Condominium Act provides that a lien may be enforced in the same manner as a mortgage. There is no disagreement with the theory of this section. However, its wording has led to numerous inquiries as to whether foreclosure is available to enforce a lien.

The lien can be enforced by way of power of sale. What should be clarified is that the procedural steps to be applied are to be those set out in The Mortgages Act. This point should be clarified in the legislation.

Recommendation No. 100:
The Condominium Act be amended to state that the procedural steps to enforce the common expense lien are those set out in The Mortgages Act.

Expropriation
An amendment to The Condominium Act is necessary to deal with the possibility of an expropriation of some portion of a condominium corporation's common elements. Currently, the Act is unclear as to whether proceeds resulting from an expropriation should be paid to the corporation or to the unit owners in accordance with their percentage of ownership of the common elements. The mechanics of the expropriation are not of concern, for these matters are adequately dealt with in existing legislation. The Act should be amended to clarify what is to be done with the proceeds of any expropriation, since it is the property of the owners that is being expropriated.

Recommendation No. 101:
The Condominium Act be amended to provide that proceeds received as a result of an expropriation be paid to the unit owners in accordance with their percentage of ownership of the common elements as set out in the declaration.

The Condominium Act was amended in 1975 to require a corporation to supply a certificate of arrears —an estoppel certificate — to a purchaser who requested it with the consent of the owner. Several problems have arisen as a result of this amendment.

If an owner requests the certificate, in place of the purchaser, is the corporation still estopped against the purchaser? This issue has not come before the courts for determination. However, this point should be clarified in the legislation. It was also suggested that the Act be amended to require the vendor to supply the certificates. The problem with this suggestion is that if the vendor fails to supply it, the purchaser is not protected vis-a-vis the corporation.

Recommendation No. 102:
The Condominium Act be amended to provide that either an owner or a purchaser may request a certificate and once the certificate is supplied or is not supplied within the time limits in the Act, the corporation will be estopped from claiming against the purchaser where the purchaser has relied on inaccurate or insufficient information.

If accepted, the recommendation that either a vendor or purchaser be entitled to request a certificate, would leave it to the parties in the transaction to decide who, in fact, will supply it.

The Act uses the word "give" with respect to the estoppel certificate. The legal definition of the word "give" is "to provide at no charge". Many corporations however, are charging for supplying the prescribed form of certificate, as it is a means of recovering their costs and the fee is not substantial enough that the parties are prepared to delay a transaction on this account.

The options the Study Group was faced with on this issue were to make it clear that no fee would be payable for a prescribed certificate, or improve the form of certificate, or require the corporation to supply documents and set a maximum fee which could be charged.

Since the purchase of a condominium unit involves much more detailed information than a single-family home, purchasers must be supplied with, or given access to, all the relevant materials which could affect their decision.

Estoppel certificate
Included in the material to be supplied should be a more extensive certificate of estoppel. It should set out the total amount the corporation had in reserve at the end of its last fiscal year, whether any of those funds had been used in the current year, whether the corporation knows of any major repairs which are required to be carried out, and whether any substantial changes in the common elements or assets of the corporation are contemplated. Additional matters may also be necessary for inclusion, and further consideration should be given to this matter to ensure that the purchasers are fully informed.

Along with the certificate, the corporation should supply copies of the declaration, by-laws, rules and regulations, audited financial statements as of the end of the previous fiscal year and a current budget. This will help ensure that purchasers in a resale are given every protection possible.

Recommendation No. 103:
The Condominium Act be amended to prescribe:

A. A maximum fee of $25.00 for the provision of the estoppel certificate and accompanying documents.

B. An expanded certificate.

Resale: cooling-off period
The principle of cooling-off should apply to a resale condominium unit, as a purchaser on a resale must be fully informed. However, in a resale situation, the 10 days should run from the later of signing of the agreement, or the provision of the estoppel certificate, if one is requested in accordance with the agreement of purchase and sale.

Notwithstanding the rescission period recommendation, a purchaser should not have the right to rescind a purchase agreement if he received a copy of the certificate 10 clear days prior to the execution of the purchase agreement.

The 10 day cooling-off period will be an automatic right of rescission, without the need to show a breach of the agreement, and will entitle the purchaser to the full refund of any deposit he may have made.

Recommendation No. 104:
The time period for rescission on a purchase from a developer apply to a resale (see chapter on Purchasing a Condominium).

Chapter 12
The Registrar

During the course of the public hearings, one of the most repeated suggestions was for a central government office, which would be accessible to all persons involved in condominium living and development.

The first question to ask when considering a recommendation for a Registrar of Condominiums is why is it necessary? In particular, why should the sale of a condominium unit be treated any differently from the sale of a new house? The reason that a higher degree of consumer protection is necessary when condominiums are sold is, it is alleged, that the condominium concept is more complex and less understood by the buying public. A condominium has the unique combination of units and common elements which results in two proprietary regimes in one building, a concept foreign to most home buyers. Thus, the condominium combines independence with interdependence in a way that is not present in any other kind of housing. The administrative framework for managing the affairs of the condominium (a corporation with an elected board of directors) and the necessity of a property management company to maintain the property (the costs of which are paid out of the common expenses of each owner) are both unfamiliar concepts to most purchasers. The existence of by-laws apart from municipal by-laws for condominiums, the problems of insurance for both the units and the common elements, and termination of the condominium will also be new to purchasers.

Therefore, the fact that the purchaser of a condominium is buying something completely different from anything he has ever lived in before and which is far more complex legally, requires that the relationship between the vendor and purchaser be regulated in a way that is not present in the purchase of a new house. Without better regulation, the likelihood is greater that a condominium purchaser will face some of the unpleasant experiences described in many of the briefs, that he may realize one month after moving into a condominium that he is not living in what he expected, but in something he doesn't even understand. Thus, the complexity of the transaction and the nature of the risks assumed by a purchaser demand that some greater form of protection be offered the conddominium purchaser.

It could be argued that "interference" in the condominium market by a government body should not be permitted, that if a developer is willing to sell a condominium unit and a buyer is willing to buy, then the transaction should not be interfered with. Rather than the government having to regulate the market, some may contend that the forces present in an open market will ensure that fair prices and services are provided. This philosophy clearly has not worked in the condominium market, as evidenced by the briefs presented at the public hearings and by the growing media coverage of the problems in the condominium field.

Securities

Assuming, then, that a condominium purchaser requires some sort of protection, what sort of protection is required? One possibility is the treatment of the condominium unit as a security similar to those regulated by the Ontario Securities Commission.

The question of whether a condominium unit is a "security" has been discussed by numerous legal writers. Jurisdictions in the United States treat the sale of condominium units as the sale of securities by deeming a condominium unit to be a security for the purpose of regulation by a state securities or real estate commission. For example, New York State's Condominium Act deems all condominium units to be "co-operative interests in realty" within the meaning contained in New York's General Business Law, which requires that an offering statement or prospectus be filed with the Attorney-General of New York prior to the sale of certain securities, including "co-operative interests in realty". Therefore, the question of whether a condominium unit is a "security" does not arise because the legislation deems it to be a security. Florida, Virginia, and Michigan have also legislated a condominium unit to be a security or have enacted a procedure identical to that in which a security is sold to the public, therefore treating a condominium unit as a security without expressly naming it as such.

If Ontario's Condominium Act is amended so as to either deem a condominium unit a "security" or treat it in the same way as a security, should a condominium purchaser be treated any differently than the purchaser of shares of a corporation pursuant to prospectus filing and approval under The Securities Act? There is a fundamental difference between the typical purchaser of a condominium unit and a person buying shares in a corporation. A condominium purchaser is not the sophisticated kind of investor who buys shares in anticipation of future gain; rather, he is buying with the prospect of a long-term investment which he does not necessarily intend on disposing of when its value rises. In other words, the kind of risk-taking inherent in the sale of most securities is not present in the purchase of a condominium unit. In addition, purchasers of securities in corporations usually consult independent brokers to get their advice before buying shares whereas many condominium purchasers only rarely consult a lawyer as to the viability of a project before signing an agreement of purchase and sale. Therefore, the level of regulation of the vendor-purchaser relationship would have to be greater than that of the sale of shares of a corporation.