



ACT Project

FREEHOLD STRATA TITLE PROJECT

FINAL REPORT

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PREPARED BY

CENTRETOWN AFFORDABLE HOUSING DEVELOPMENT CORPORATION

OTTAWA, ONTARIO

Program Partners:



PREFACE

The project documented in this report received a grant under the Affordability and Choice Today (ACT) program. ACT is a municipal, housing regulatory reform initiative sponsored by Canada Mortgage and Housing Corporation (CMHC) and jointly managed with the Federation of Canadian Municipalities (FCM), the Canadian Home Builders' Association (CHBA) and the Canadian Housing and Renewal Association (CHRA).

ACT, launched in 1990, seeks to stimulate changes to planning and building regulations and residential development approval procedures to improve housing affordability, choice and quality. The United Nations Centre for Human Settlements recognized ACT in 1998 as one of the top global best practices for improving the living environment.

ACT awards grants to municipal governments, builders, developers, non-profit organizations, industry associations, educational institutions, planners and architects across Canada to change housing regulations and streamline approval processes. ACT grants are awarded under three categories: Demonstration, Approval Process and Promotion. Assistance has been given to a wide range of projects across Canada.

All completed ACT projects are documented in short project overviews or solution sheets, and a number of case studies have been produced as well, to share the benefits of regulatory reform with others. These documents are available to help builders, developers, local building and planning officials, and others recognize and seize opportunities to improve housing affordability, choice and quality through regulatory reform in their communities.

For more information on ACT and ACT projects (both completed and in progress), visit the ACT Web site at www.actprogram.com, or contact:

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Affordability and Choice Today **Freehold Strata Title Project**

1. Overview

Agencies wishing to develop affordable housing must look for creative ways to increase densities and reduce development costs. In the central areas of larger municipalities, they are often obliged to consider smaller infill sites and multi-unit projects, often with a mix of commercial and residential uses. The horizontal division of ownership, between the residential owners and between the residential and non-residential owners of these projects can often be an obstacle to the successful development of these projects.

The concept of *strata title* is based on the principle that land can be subdivided in three dimensions, vertically (height) as well as horizontally (length and width). In Ontario, the conventional method of dividing ownership among the various parties involved in these projects is by means of a condominium corporation, under the governance of the provincial Condominium Act. However, the condominium legislation was never meant to cover all horizontal severance situations and the provincial Planning Act does not make specific reference, either for or against, horizontal severance. In some circumstances, Freehold Strata Title would be cheaper, easier, more marketable, and would facilitate small and mixed-use projects. In 1997, The Centretown Affordable Housing Development Corporation (CAHDCO), under the auspices of an Affordability and Choice Today (ACT) grant began to examine the implications of stratified (horizontal) severance without the use of condominium registration.

a) CAHDCO

CAHDCO was established as a non-profit corporation in February 1996. Its mandate is to initiate a community-based response to the development of affordable housing in the absence of government-sponsored housing programs. CAHDCO's objectives are to:

- provide housing for people of low and moderate incomes,
- find a role for government as a catalyst, without subsidy commitments,
- establish models which can be applied elsewhere,
- build housing that will remain affordable in the long term.

b) Freehold Strata Title Team

In addition to CAHDCO, the Freehold Strata Title team was made up of individuals representing the legal, survey, municipal planning and housing sectors. Its task was twofold. The first was to examine typical inner-city projects which would ordinarily be developed under condominium tenure, determine whether the projects could be severed horizontally under the Planning Act and consider the implications of freehold strata title severance. The team's second task was to provide recommendations to the

City of Ottawa's Planning Department regarding the conditions under which freehold strata title severance could be granted by the City's Committee of Adjustment. Attached as Appendix "A" are the members of the Freehold Strata Title project team.

2. Provincial Regulatory Environment

a) *Condominium Title*

The Condominium Act was introduced in Ontario, in the 1960's, to allow for ownership of apartments. The Act envisioned and works best with large scale projects, containing many units of a similar nature (i.e., all residential or all commercial). The project team identified several problems with condominium severance:

- It is difficult for small development projects to carry the financial costs of condominiums: posting bonds, letters of credit, legal and other costs.
- Larger developments can more easily carry these costs as they are more heavily financed.
- The condominium registration process, which is complicated and often slow, is an additional cost and an additional regulatory process to be undertaken.
- Condominiums are not as popular with consumers as freehold units.
- The legally required corporate structure is ill suited for mixed-use condominium projects. The governance is restrictive and often the interests of minority partners are ignored.
- The management model, imposed under the Condominium Act, can be overly cumbersome for smaller projects.

However the Condominium Act legislation does allow for enforcement of positive covenants; there is a well-established legal process for dealing with disputes about cost sharing the common element expenses. The Condominium Act also provides good consumer protection that would have to be duplicated in any Common Elements Agreement used with a Freehold Strata Title project.

b) *The Land Registry Act & Planning Act*

Technically, the Land Registry Act and the Planning Act are equipped to handle property division in three dimensions. However, the Planning Act does not specifically deal with freehold strata title. Rather, the authority that is provided is embodied in the Planning Act which enables the local Committee of Adjustment and/or Land Severance Committee to approve the severance of land where it is determined that a plan of subdivision is not necessary for the orderly development of the municipality. Although a plan of subdivision would not be required when dealing with the horizontal severance of units within a building, the only real guidance that is provided to the Committee of Adjustment, through the Planning Act, are issues which must be reviewed when dealing with a Plan of Subdivision. While some of these matters are of relevance, many are not

and there are issues relating to horizontal severance which are not specifically referenced in the Planning Act.

c) Freehold Strata Title (FST)

The Freehold Strata Project Team examined how to apply three-dimensional subdivision of property outside of the Condominium Act by achieving compliance with the Planning Act of Ontario. It was thought FST, in some circumstances, would allow for a cheaper and more flexible method of horizontal severance and facilitate:

- legal Agreements between the various parties that were more flexible than similar Agreements under condominium title,
- more appropriate governance between mixed-use partners,
- the conversion of vacant commercial space to another use,
- greater affordability of unit in mixed-use projects,
- encourage mixed residential commercial projects.

3. Municipal Governance

a) Severance Responsibility

In Ontario, the Planning Act establishes the ground rules for land use planning including dividing land into separate lots for sale or development. This Act grants the local municipality the authority to prepare an Official Plan for the defined planning area and gives it the power to approve severances. There are three mechanisms by which severances can be done. They are:

i) Subdivision Approval

Subdivision Approval refers to the division of previously undivided land into building lots. This approval process ensures the lots are on a registered plan and that adequate municipal services (water, roads, snow clearance etc.) are in place.

ii) Part Lot Control

Part Lot Control exempts an owner from the severance prohibitions in the Planning Act when a property, which is already registered on a plan of subdivision, is divided into smaller lots or combined with other lots.

iii) Consent Severance (Committee of Adjustment)

The Planning Act authorizes the municipality to establish a local Committee of Adjustment. The Committee of Adjustment has the authority to make decisions on many issues including:

- minor variances from the Zoning By-law
- permission to alter or change a lawful non-conforming use of land

- approval (consent) to sever land (divide a parcel of land into more than one lot)
- consent to register a mortgage over part of a property
- consent to register a lease over part of a lot for more than 21 years.

As the consent-granting authority, the Committee of Adjustment is responsible for evaluating consent applications on planning merits; that is, to determine whether or not the granting of the consent is in the public interest. The major planning principles considered are:

- does the application conform with the intent of the official plan policies?
- does the application conform with the intent of the zoning by-law regulations?
- is the application appropriate for the orderly development of the municipality?
- is there a requirement for a full Plan of Subdivision?

It was thought the interests of the various parties involved in a freehold strata project can be safeguarded through conditions imposed by the Committee of Adjustment. In the short term, the Committee of Adjustment was seen to be the most practical method to achieve freehold strata severance. The Committee of Adjustment operates under the authority of the Planning Act which does not give clear direction regarding horizontal severance. The Project Team acknowledged the Planning Act should be changed to specifically allow this type of severance.

b) City of Ottawa Planning Precedents

Despite specific direction under the Planning Act to allow Freehold Strata Title, the City of Ottawa has several planning policies and practices which set the stage for enabling Freehold Strata Title.

i. Official Plan

The City's Official Plan (Chapter 3) outlines specific policies and principles that are compatible with Freehold Strata Title. This includes statements regarding affordable housing, a mix of accommodation suited for different lifestyles and incomes, providing for affordability in housing, increased use of existing infrastructure and within existing neighborhoods. Policies within Chapter 4.0 support economic development initiatives to diversify Ottawa's economy and to support small and large business ventures.

ii. Bylaw Z2K and Bylaw 93-98 "One Lot for the Purpose of the Bylaw"

The City of Ottawa has traditionally allowed freehold units to be located on private streets. A condition of the Committee of Adjustment consent is a Common Elements Agreement that establishes obligations of the owners to maintain common elements including private roads and services. The concept of "one lot for the purpose of the bylaw" is important for the provision of freehold units on private streets. This bylaw clause allows setback and other bylaw provisions to apply to the entire building on the site, rather than to the individual severed units or lots within the project. This allowed

lots to be severed into freehold, despite the fact that the resultant individual lots would not necessarily conform to the minimum requirements of the bylaw.

In 1998, the City of Ottawa put forward a draft of its new zoning bylaw Z2020. The concept of “one lot for the purpose of the bylaw” was removed from the proposed new bylaw despite the fact that the intensification allowed by this provision was clearly consistent with City Official Plan policies on intensification and use of existing infrastructure. The absence of this provision would have also made the creation of FST more difficult as well. The absence of a “one lot for the purpose of the bylaw” provision was successfully opposed by CAHDCO, members of the Ottawa development community and others concerned about affordability and urban intensification issues.

iii. Freehold Townhomes on Public Streets

Because of the “one lot for purposes of the bylaw” clause in Ottawa’s Zoning Bylaw, Ottawa has considerable positive experience with freehold town homes fronting on to private streets. The Committee of Adjustment approves joint use and maintenance agreements with respect to the common elements. These townhouse projects require a vertical severance for freehold title. The addition of a horizontal severance, which would be required if for a stacked townhouse or walk-up apartment built form, does not introduce any additional common element issues.

iv. Rental Housing Protection Act (RHPA) Applications

In the late 1990’s, when rental vacancy rates rose above 3%, the City allowed about 1100 units of rental townhouses to be converted to ownership. Under the terms of the provincial RHPA Act, (subsequently replaced by the Tenant Protection Act) the City of Ottawa can impose conditions for the conversion of rental units to ownership. These conditions include Common Element Agreements. These Common Elements Agreements, which apply to existing townhouse projects, would be very similar to Agreements required under FST ownership. The City of Ottawa does not require separate services, but the owners must agree to share the cost of repairs to the shared services. Landscaping and snow clearing costs are shared only for the common areas; private areas are the responsibility of the owners

v. Existing Horizontal Severance Examples

As noted below the Committees of Adjustment (under the authority of the Planning Act) of Ottawa and other Ontario municipalities have historically allowed large portions of multi-use projects to be severed horizontally. Given that stratified ownership works to sever portions of large projects, under certain conditions, there is no reason to believe it would not work to sever individual units of smaller projects.

In addition, the City of Ottawa’s Committee of Adjustment has historically allowed side-by-side units (doubles) to be converted to ownership. These units, although largely severed vertically, occasionally have some sections of one unit which are above the other unit. This necessitates an additional severance in a horizontal direction.

4. Legal Issues

A key element of the Condominium Act is an enforceable "binding covenant" which forces unit owners to abide by the rules of the Condominium Corporation including sharing the in common operating costs of the project and contributing to a replacement reserve fund. It was acknowledged that despite the fact that some people are deadbeats, an investment in property gives owners a financial "stake" and therefore a concern about its upkeep.

One concern is how to deal with those who do not abide by the rules. Enforceability can be a potential problem with a Common Elements Agreement which binds "owners-in-common". It was noted this problem is not unique to strata title, any project with common elements carries this risk. Short and long term consumer protection under FST will be a major concern of the Working Group.

The enforceability of Common Element Agreements is a major concern. Terms of Common Element Agreements are considered *positive covenants*; the owner is obliged to do something, in this case issues a separate cheque each month for the shared project costs. The positive covenant is binding between the initial signatories but could be hard to enforce on future owners. There could be problems if a future owner defaults or refuses to pay a cost. The owner of a condominium is obliged to respect a *negative covenant* which does not allow an owner to have certain rights. These covenants are easier to enforce through the Condominium Act.

A "Common Elements Agreements" process used by the City to occasionally sever freehold rental units (doubles). This Agreement creates a positive covenant i.e. an agreement to contribute a sum of money to towards the maintenance of the common property rather than a "restrictive covenant" A positive covenant is not binding to the land or property but rather to the individual parties in the agreement.

The project team reviewed several existing leases to determine the conditions imposed on the respective parties. These conditions include Common Elements Agreements, reserve fund contributions and clauses relating to short and long term consumer protection.

The Summary of Recommendations of the 1989 Province of Ontario Law Reform Committee Report proposed reforms, tabled by a previous provincial government, which would have facilitated stratified title projects by allowing land covenants, institutionalizing home-owner associations and strengthening the enforceability of reserve fund clauses. A long-term objective of the FST team is to lobby the provincial government on behalf of future changes to the Planning Act and other applicable legislation.

5. Consultation with Municipal Planning Officials

Municipal and Regional planning officials and Committee of Adjustment representatives across the Province of Ontario were canvassed to determine the interest in, and experience with horizontal severances. There was no experience with and no examples of Freehold Strata Title being used to sever individual residential units. There were, however, many examples of horizontal severances used to separate commercial uses within a project.

a) *Region of Peel*

The Committee of Adjustment has granted horizontal severances for many years. A summary provided included these examples:

- The severance of a shopping centre building from shopping centre lands. The severance line was primarily horizontal but include basement areas included horizontal and vertical severances.
- The severance of residential components of a building from commercial components of the building. Issues such a below ground setbacks and right to light easements were addressed.
- The adjustment of previous severances to make horizontal, vertical and multi-level severance easements and right of ways consistent with the buildings “as constructed”.

The severance of a retirement home from a condominium apartment with ingress/egress and off street parking for one use located in part and in whole below the uses of the other owner.

b) *Kitchener-Waterloo*

In an attempt to address affordable housing issues, the Department of Planning and Development has opted to use provisions in the Planning Act regarding “Land Lease Communities” to allow tenants to own units and lease land from the landlord. Planning staff noted the Department would be apprehensive about permitting FST should the legal framework create additional challenges for the staff.

c) *City of Toronto Urban Development and Planning*

The City has a large number of commercial/warehouse buildings that have been or are undergoing conversion to residential apartments and live/work apartments. The Planner acknowledged these conversions, which are being done in medium scale buildings, would offer a considerable opportunity to use an alternative severance framework for conversion. There would be considerable interest, from the Toronto development community, for an established, clear framework regulating FST.

d) City of Toronto Committee of Adjustment

According to the Committee Secretary, the Committee has been approving about ten FST conversions a year in Metro Toronto. The process is not informal, it operates along established guidelines followed by the Committee of Adjustment, which acknowledges its jurisdiction over land. Local land surveyors are aware of the requirements for approval. The parts above and below grade are tied to a small portion of the land in order to comply with the provisions of the Planning Act. Providing the building in question has a “clear and obvious” relationship with the land upon which it sits, whether through elevator shaft, stairwell or other physical features”, the Committee claims authority to grant the application. One project, at Yonge and Bloor in Toronto, included retail, parking, hotel, apartment and office uses. No approvals have ever been given to sever residential units in an apartment.

The Committee of Adjustment believes FST falls within its mandate and takes an active role in promoting the applications. The Secretary believes the FST framework can, under some circumstances, yield better results than condominium severance. The only underlying principal that the Toronto Committee of Adjustment requires, to ensure compliance with the Planning Act, is that each parcel created have a direct relationship with land by way of a common building element.

When applications for strata plans are considered, the Committee normally attaches a number of conditions such as common elements agreements to any approval. Because of the complexity of the severance, the applicant is required to colour code the reference plans to ensure there is a connection to the land for each severed portion.

e) City Of London

The Planning Department has undertaken some horizontal division of ownership through the Committee of Adjustment but no framework for the required granting authority has been agreed upon. The City usually uses the Condominium Act for horizontal severance of ownership even for larger mixed-use projects. It was the opinion of one Planner that the governance of Condominium ownership is a better mechanism to handle the differing interests of the various parties. The Planner indicated London has only limited potential for large scale conversions in their central business area.

f) Greater Kingston

The Planner expressed concerns regarding the authority of the Committee of Adjustment to grant FST severance applications, believing the Committee’s authority is limited to severance of land, not buildings. Concern was also expressed regarding shared maintenance and shared access issues and enforceability of the shared costs expenses. The Planner believed multi-unit projects would be better severed through the condominium act. The Planner indicated there would likely be interest among the development community in the concept.

g) City of Ottawa Committee of Adjustment

A representative of the Committee Adjustment identified several large projects that used horizontal severances to separate the ownership of portions of the building including severing floors of the underground parking garage. These include Minto Place at Laurier Avenue and Lyon Street. In this project, the underground parking and two levels of commercial retail space are freehold. The Condominium Act applies only to the portions of the building above the freehold ownership.

6. Impact of Strata Title

a) Legal

The cost of the Common Elements Agreement documentation for individual units severed under freehold strata title is initially likely to be slightly greater than comparable condominium agreement costs. This is because the Common Elements Agreement would have to be tailored to the specific requirements of each project, unlike a Condominium Agreement which would have many more standard “boiler plate” clauses and conditions. In addition, the purchaser of a unit will incur higher legal costs because his or her lawyer is not likely to be FST concept. Because of this, one of CAHDCO’s strategies, should it be able to develop a project using freehold strata title, would be arrange a workshop for local solicitors to familiarize them with the concept.

However the legal costs of registering the project on title would be lower than registering a condominium because the registration process under Land Titles is easier than under condominium title.

b) Survey

The Freehold Strata Project Team included two surveyors, whose firm undertakes most of the large strata title projects in the City. They indicated the implications of using a FST tenure on the survey are minimal and manageable.

A survey under FST would be conceptually slightly different than a condominium survey. For example, the ownership of common walls and common floors would likely be laid out differently under a freehold strata survey than under a condominium survey.

In a condominium survey, the outside wall, from the inside of the interior drywall would be common property. With a strata title survey, the entire exterior wall would be owned and maintained by the unit owner.

c) Financing

Financing the construction costs of a condominium can be a problem. The developer cannot get the purchasers money until the units have a title and the mortgages are in place. The individual homeowner cannot get a mortgage until the title is registered. Registration cannot happen until the whole project is finished. This means the project has to be carried on the more expensive construction financing until all of the units are registered.

The Freehold Strata Title concept was discussed with several financial agencies. In Ottawa, freehold townhouses (severed vertically) located on private roads and using a Common Elements Agreement for the shared common costs, is a common built form. The banks have no hesitation in providing construction or mortgage financing for these units. There were therefore no concerns identified, by the financial agencies which reviewed the concept, that would prevent the financing of a FST project as the only difference is the addition of a horizontal severance. There was no indication a FST tenure would have a negative impact on mortgage interest rates or the ease of mortgage renewal. The financial agency and its lawyers would review the Common Elements Agreement and the Agreement of Purchase and Sale to ensure its ability to assume title to the property, in case of default, was safeguarded. All the financial agencies indicated that CMHC construction or mortgage insurance would be an additional incentive to provide financing to a project.

d) Marketing

In the Ottawa area, freehold units generally have greater appeal in the marketplace than condominium units. Housing developers would therefore prefer to market a freehold strata title unit rather than a condominium unit and were very supportive of the concept. Because Ottawa has experience with freehold units on private roads, the Common Elements Agreement which would accompany a FST project was not seen to be a barrier to sales. In fact, two of the developers which reviewed the concept indicated they had previously and unsuccessfully tried to create a project with horizontal severance using the Part Lot Control process.

e) Registration

In the Province of Ontario the survey registration process for condominiums usually takes four months from construction completion. During this period the developer must carry the project under the terms of the construction financing, which is more expensive than mortgage financing. Only when the condominium survey is registered can the construction financing be replaced by the purchaser's mortgage financing.

7. Compatibility of FST With a variety of Built Forms

a) Walk-Up Buildings

The term *walk-up* refers to buildings which do not require an elevator under the building code. These buildings are no higher than three and one-half floors above grade and are most commonly wood framed although other structural systems, steel or concrete, can be used. The Project team felt these would be the most appropriate built form for FST use because the cost of repairs to the common elements is likely to be lower than the cost to repairs of elevatored buildings.

Associated with this project was a review of the *Flex Housing* concept and its application to a strata title project. In the range of housing options offering affordability, the narrow-front townhouse or stacked townhouse is the option which comes closest to providing the prospective owner with the characteristics of home ownership while at the same time facilitating affordability and the sustainability resulting from increased density. Reduced house size and increased density achieve savings in the cost of land and infrastructure, building materials and energy consumption.

Flex Housing, also known as the *Next Home* concept, provides a multi-level “walk-up” (under 3-1/2 floors) modular design allowing owners to purchase up to four floors and move rooms and walls using modular panels. It responds to the changing nature of family relationships, allowing them to contract and expand as family size and needs change. The key to flexible housing design is to build in, during construction, the necessary features required to adapt to a lifestyle change. The home can then be easily and inexpensively adapted to suit future needs, including buying selling a floor of the building.

However, Freehold Strata Title would work especially well with the *Flex Housing* concept as the adaptability of this built form is well suited to the Freehold Strata Title tenure. If an owner wished to buy or sell a floor of his/her unit, an amendment to the title would have to be made. Unlike amending a condominium title, which would require the agreement of all the condominium owners, the freehold title could be amended by consent of the local Committee of Adjustment, a much easier and quicker process.

b) Elevatored Buildings

The Project team considered larger developments, particularly where major mechanical elements such as elevators are provided, to be more appropriately subdivided through the condominium process. This process is also less onerous for larger projects and provides the necessary consumer protection that is required for large developments with numerous owners and with significant structural and mechanical common elements.

8. Common Elements Agreement

There are a number of issues relating to legal, administrative and common repair costs which would have to be addressed in a Common Elements Agreement. These include:

a) Interior/ Exterior Elements

The common areas of the property including driveways, parking areas, landscaped areas and the roofs. The common interior areas of the building including structural and common walls, stairwells, corridors, common lobby areas and rooms.

b) Common Expenses

The common expenses would include:

- taxes,
- utility charges (sewers, water, hydro),
- costs of repairs, replacement, maintenance of the common property,
- landscaping repairs and maintenance,
- snow removal,
- maintenance materials, tools and supplies,
- legal costs and other professional costs,
- personnel costs to maintain the common property,
- replacement reserve fund contribution costs,
- insurance and indemnification.

c) Legal Issues

The Common Elements Agreement would also have to address legal and management issues including:

- the assignment of the co-tenancy interest on resale
- changes to the common property such as party walls/supporting walls, foundations and other common structural elements and roofs,
- changes to grade and the slope of land,
- alterations to the exterior visual appearance,
- the use of the unit and any restrictions on leasing.

9. Recommendations & Policy Framework for Official Plan Amendments

One of the short term goals of the FST project team was to focus on the policy framework for an OP amendment. The project team members reported on the implications/impact of FST on their respective disciplines. This was done as a means to assist the representatives of the City's Planning Department on the project team with the drafting of recommendations regarding Official Plan amendments giving direction to the Committee of Adjustment to allow FST.

a) Official Plan Amendment

The proposed Official Plan Amendment is to provide a framework for strata title is consistent with both City Of Ottawa housing and economic policy objectives. It supports economical infill development, provides opportunities for ownership which may

otherwise not be achievable for both residential units and small scale commercial units, responds to market demands for commercial and residential ownership, and supports reduced housing costs and business costs by enabling business owners to own and occupy commercial space within commercial and mixed use buildings.

b) Departmental Recommendations

Four Planning Departmental recommendations, to be considered by the City's Planning and Development Committee, were proposed:

- i. That the Official Plan Amendments to establish a framework for the Committee of Adjustment to give consideration to consent applications for strata or horizontal severances.
- ii. To amend the draft new City of Ottawa Bylaw (then under consideration) to permit, where stratified severance is approved, the consideration of all parts created through stratified severance as "one lot for the purpose of administering and applying the zoning bylaw", a carry over of the provision of the previous bylaw,
- iii. That City Council request the Province of Ontario to introduce clear legislation to amend the Planning Act to give recognition and legal enforceable status to Common Element Agreements in a manner similar to the status and enforceability given under Site Plan Control Agreements.
- iv. That City Council request the Province of Ontario to introduce clear legislation through an amendment to the Planning Act that will facilitate local municipalities through the land severance committees or Committees of Adjustment to give consideration to and approval of stratified severances including specific approval for individual residential units.

c) Proposed Policy Framework and Rationale

The draft proposed policy framework, to be included in the Official Plan, outlined the rationale for implementing freehold strata title and included a detailed list of issues to be considered by the Committee of Adjustment. The policy framework proposed through this amendment is intended to provide a mechanism for achieving compliance with the Planning Act of Ontario by requiring that each parcel created have a relationship to land and for integrating the various interests of the property to ensure all owners have equal rights and obligations of ownership, consistent with the consumer protection principals of the Condominium Act.

Attached as *Appendix C*, is the draft *Recommendations and Official Plan Amendments*, including the policy framework for changes.

10. Initial Goal - Projects in the City of Ottawa

Following the gathering of information on the subject the group set goals with respect to the size of the proposed FST project, building type, building elements and built form. On the assumption that the City's Official Plan would be amended to allow, under specific circumstances, a Freehold Strata Title project, CAHDCO pursued, in 1998, two projects which were thought to be appropriate:

a) *Somerset and Rochester*

This property has been vacant since a fire in the mid 1980's, destroyed a tavern and residential hotel. The site is located on a major commercial street in Ottawa. The zoning allows a mixed commercial/residential project and the owner had municipal approvals to construct 10,000 S.F. of commercial space at grade and below grade with 4,000 SF. of residential space above. Freehold strata title was seen as a more appropriate method to deal with the governance and on-going administrative issues associated with a mixed-use project.

The below grade level included 16 parking spaces, a garbage room and the mechanical rooms. CAHDCO hoped to create 12 three-bedroom townhouse units on top of the ground floor commercial space. The owner of the property was, and continues to, experiencing difficulties finding a purchaser willing to assume responsibility for both the commercial and residential portions of the building.

Areas common to both the residential portion included the mechanical/electrical rooms, the stairs to a central courtyard, and the courtyard and the bicycle room. The areas common to the residential and commercial included the concrete structure some exterior façade details, the below grade parking area and the courtyard/commercial roof.

The residential/commercial mix remains a barrier to the development of this property. To date, it remains vacant.

b) *King Edward Avenue and Clarence Street*

This was a vacant site in Ottawa's inner urban area which seemed appropriate for a stacked townhouse development. The stacked townhouse form is a good model for housing designed with affordability in mind. This housing type can ensure affordable housing is made available to low and moderate income families and first-time home buyers home owners in or near the urban areas of large cities. Thirty stacked townhomes can be created on this site. The elements common to the property include exterior soft and hard landscaping, parking areas and driving aisles and the roofs. Freehold Strata Title would have been a viable option for the site had it been permitted by the City of Ottawa. CAHDCO subsequently purchased the property and is currently marketing and seeking municipal approvals for a 30 unit affordable stacked townhouse condominium project.

11. City of Ottawa Legal Branch Reaction

The City of Ottawa's Legal Department was not sympathetic to the concept of Freehold Strata Title. In a letter from Jerry Bellomo, Chief City Solicitor, to Ed Honeywell, the lawyer on the FST project team, dated October 28, 1998, the following concerns were expressed:

- there is no specific reference in the Planning Act, to conditions under which a horizontal severance can be granted,
- as it is not clear the City has the authority to grant horizontal severance, the City could be liable should problems occur at a later date,
- there are no precedents in the province for freehold horizontal severance. The solicitor asked a question, at a recent meeting of municipal lawyers, regarding the use of residential FST in the province. No one at that meeting was aware of any examples,
- it will be difficult to enforce positive covenants on future owners. Legislative sanction from the province is needed.

The letter for Jerry Bellomo is attached as Appendix "D".

The FST project team member from the Region of Ottawa-Carleton reported on discussions with the RMOC legal branch. The Region's Chief Solicitor was in basic agreement with the City's Legal Department. He believed the legal tools are not available under the Planning Act.

12. Long Term Strategies

In light of the City of Ottawa's Legal Branch's refusal to support the concept, the FST project team identified three courses of action:

- Attempt to have City Councillors lobby the City Legal Branch in an effort to change the decision. While many Councillors were supportive of the FST, it was acknowledged the Councillors would not be able to reverse the decision of the Legal Branch and would be unlikely to pursue an initiative against the advice of their legal staff,
- Make a Site Plan Control application requiring a Committee of Adjustment consent horizontal severance and appeal to the OMB if the application was rejected. The FST recognized the OMB appeal would be timely, expensive and by no means guaranteed to succeed,
- Pursue amendments to the Planning Act of Ontario. Given that legislative sanction may be required to implement FST, it was agreed we should pursue amending the Planning Act.

- Use City of Ottawa and Region of Ottawa-Carleton Planning staff resources to produce reports to Committee and Council requesting the Province to implement Planning Act amendments. This course of action was chosen a motion from Council, requesting the Association of Municipalities of Ontario to examine the issue of Freehold Strata Title was passed. Attached as Appendix “E” is the City’s motion to AMO.
- Meet about the issue with MMAH policy staff, making specific reference to Provincial objectives (Provincial Housing Statement) regarding housing affordability and intensification. Meetings with MMAH and Consumer and Corporate Affairs staff were held on May 5, 2000 and August 14, 2000
- Meet with local, Progressive Conservative Members of the Legislature. A meeting was held with Brian Coburn, MLA and Legislative Assistant to the Minister of Municipal Affairs and Housing on April 28, 2000.

a) *Changes to the Planning Act*

A long term goal of the FST project team to lobby is to use local resources to lobby for changes to the Planning. This is because there are considerations that should be addressed when dealing with stratified severances that are not clearly addressed in the Planning Act legislation. For this reason it was considered appropriate to request the Province to introduce legislation through an amendment to the Planning Act that would clarify the factors that should be considered by the Committee of Adjustment in dealing with stratified severance requests. Some of the more unique considerations, as detailed in the proposed Official Plan Amendment, deal with ensuring a relationship to land for each parcel created, ensuring common access and rights-of-ways/easements, and requirements for common elements agreements.

As a result of the meetings with MMAH, MMAH agreed to have the issue of FST placed on the agenda of the Municipal Subcommittee of the Provincial of Ontario’s Housing Supply Working Group. The Ontario government created the joint government-industry-labour Housing Supply Working Group in the fall of 2000. The group is examining barriers to the supply of new rental housing and ways to engage the private sector to build affordable housing. While other issues have been considered of higher priority, we are informed this issue will be considered by the Municipal Subcommittee.

13. Conclusion

Freehold Strata Title can be a valuable mechanism to help municipalities facilitate development of smaller infill sites and multi-unit sites in inner areas of Cities. It is consistent with the recent Smart Growth initiatives in many cities. It can enable municipalities to create affordable housing and households of different incomes, allow for increased use of existing infrastructure, help create projects within existing neighborhoods and help to convert unused commercial space to residential. When applied to a mixed-use project, it can help support economic development initiatives in inner City areas.

Freehold Strata Title as a severance mechanism would be under control of the local Municipal Council, enabling Council to respond to local housing and economic needs according to local planning conditions and precedents. The municipality would set standards for the use of Freehold Strata Title including the size of the project, the number of units, location of projects and the most appropriate built form of the project.

Freehold Strata Title would reduce the financing and registration costs of smaller projects and result in a easier title registration process. The resulting governance of these projects would be tailored to the needs of the individual project rather than having to respond to the governance mandated through the condominium legislation.

Appendix A

Freehold Strata Title Project Team Members

- Dennis Carr, *CCOC and CAHDCO*
Development Coordinator, Centretown Citizens Ottawa Corporation, CAHDCO Freehold Strata Title Project Coordinator and Secretary to the CAHDCO Board of Directors
- Ed Herweyer and Ian Watson, *Annis, O'Sullivan, Vollbakk Ltd.*
Ontario Land Surveyors. One of Ottawa's leading surveying firms, Annis O'Sullivan Vollbakk, offer a full range of surveying services, including air-rights and condominium stratified title severance.
- Ed Honeywell, *Soloway Wright Solicitors.*
One of Ottawa's leading firms in the field of real estate law, the firm was involved in the creation of the first high rise condominium project in Ontario in the late 1960's.
- Stan Wilder, *City of Ottawa Development Branch.*
The Development Branch has a mandate to facilitate affordable housing projects by non-profit groups.
- John Smit, *City of Ottawa Planning Department.*
The Planning Department is pursuing amendments to the City's Official Plan to facilitate approval, by the Committee of Adjustment, of freehold stratified severance. This work is consistent with City Official Plan policies which support housing affordability , mixed use and intensification in the inner urban areas.
- Rob MacKay, *Planning Branch, (RMOC)*
As the delegated approval authority for severances, the RMOC wants to ensure that FST severance is consistent with other severance approval functions. As well, the Regional Official Plan supports housing affordability, infill and intensification.

Appendix B

Consultation

a) Development Industry

Discussions regarding the freehold strata concept were held with numerous Ottawa-area Development industry representatives including:

i. Builders/Developers

- Pierre Dufresne, Chair, Ottawa-Carleton Homebuilders Association, Development Council and Chief Land Developer, Tartan Homes,
- John Doran, Domicile Developments,
- Michael Noonan, Minto Developments
- Doug Cassey, Charlesfort Developments

ii. Planners

- Jane Ironside, Jane Ironside and Associates
- Ted Fobert, Fotenn, Chair, Committee of Adjustment
- Linda Hoad, former Chair Committee of Adjustment

iii. Lawyers

In addition to the legal representative on the FST Project team, the following Lawyers, with experience in Municipal and Real Estate law in the province of Ontario participated in the discussions:

- Janet Bradley, Gowling, Strathy & Henderson
- Stephen Guest, Stephen C. Guest, Barrister and Solicitor
- Allan Cohen, Soloway Wright,
- Susan Gibson, Soloway Wright

b) Canada Mortgage and Housing Corporation (CMHC)

The issue of freehold strata title was discussed as part of talks with CMHC about providing mortgage insurance for CAHDCO's affordable homeownership project. This included discussions with the CMHC Ottawa Area Office, the Canadian Centre for Private Public Partnerships and with the Chief Underwriter for the Province of Ontario. The CMHC officials, while generally responsible for facilitating affordable housing, considered the issue of horizontal severance to be a municipal and provincial concern and were reluctant to commit to the concept.

c) Politicians

i. Provincial

A discussion about the FST concept was held with Brian Coburn, Member of the Legislature for Ottawa-Orleans, and Legislative Assistant to the Minister of Municipal

Affairs and Housing. Mr. Coburn acted as liaison between CAHDCO and with senior Ministry of Municipal Affairs and Housing staff.

ii. Municipal

The concept was discussed and supported by City of Ottawa Councillors Elisabeth Arnold and Ron Kolbus as well as Region of Ottawa-Carleton Councillors Diane Holmes and Peter Hume.

d) *Province of Ontario Planning Officials*

Two meetings were held with senior provincial officials:

i. Ministry of Municipal Affairs and Housing

- Eric Adams, Senior Policy Advisor, Affordable Supply Policy Section,
- Diana Dewar, Manager, Legislation and Research, Provincial Planning and Environmental Services Branch.

ii. Ministry of Consumer Corporate Relations

- Karen Golden, Sr. Policy Advisor, Policy Agency and Relations Branch

e) *Financial Agencies*

Discussions regarding construction financing of CAHDCO's affordable homeownership project were held with several Ottawa area financial agencies including:

- the Bank of Montreal,
- the Caisse Populaire Ste. Anne,
- the Royal Bank and,
- the Civil Service Co-op.

f) *Other Organizations*

Information on FST has been provided to the following organizations:

- Ontario Non Profit Housing Association
- Canadian Housing and Renewal Association
- Association of Municipalities of Ontario
- Various non-profit and co-operative housing agencies including:
 - Hamilton Municipal Non-profit Housing Corporation,
 - City Living (City of Ottawa Non-profit Housing Corporation),
 - City Home (City of Toronto Non-Profit Housing Corporation),
 - Metro Toronto Housing Company Limited,
 - Centretown Citizens Ottawa Corporation,
 - Nepean Non-Profit Housing Corporation,
 - Alex Laidlaw Housing Co-operative,
 - Peterborough Community Development Corporation

Appendix C

Proposed Recommendations and Official Plan Amendments

The following sets out proposed departmental recommendations for regulatory (zoning) and policy (Official Plan) changes to support and provide guidance to the Committee of Adjustment in giving consideration to applications for Stratified Title. Also detailed is a policy framework for inclusion into the City's Official Plan, a draft Preamble for the proposed Official Plan Amendment, and a rationale for Recommendation 3.

PROPOSED DEPARTMENTAL RECOMMENDATIONS

- I. That the Official Plan Amendment detailed within Document ___ be Approved and Adopted to establish a framework for the Committee of Adjustment to give consideration to consent applications for stratified or horizontal severance.
2. That the Draft New City of Ottawa Zoning By-law be amended as detailed in Document ___ to permit, where a stratified severance is approved, the consideration of all parts created through the stratified severance as one lot for purposes of administering and applying the zoning by-law. (carry over of the 4C provision of Z-2K when stratified severances are approved)
3. That City Council request the Province of Ontario to introduce legislation to amend the Planning Act to give recognition and legal enforceable status to Common Elements Agreements in a manner similar to the status and enforceability given Site Plan Control Agreements.
4. That City Council request the Province of Ontario to introduce legislation through an amendment to the Planning act that will facilitate and make clear the ability of local municipalities, through their land severance committees and/or their Committees of Adjustment, to give consideration to and approval of stratified severances.

PROPOSED POLICY FRAMEWORK (to be included within Chapter 13 of the Official Plan as Policy 13.22.2)

- a) The Committee of Adjustment, in addition to considering consent applications as set out in Policy 13.22. 1, may consider consent applications for stratified or horizontal severance of units within low profile (maximum four stories) minor and moderate residential development projects, commercial projects located within Neighborhood Linear

Commercial Areas, or mixed-use projects/buildings provided that projects/buildings proposed for stratified severance are not served by an elevator, have frontage on a public street, and are able to be serviced directly from the municipal services, and provided the Committee of Adjustment is satisfied that the scale of the project is such that Condominium Approval is not necessary to allow for the individual sale of units, to provide for shared ownership of common elements within the building, and to provide for shared ownership of exterior access and amenity areas.

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- b) The Committee of Adjustment in reviewing consent applications for stratified title shall in addition to taking into account those matters set out in Policy 13.22.1 b) i), ii), v), vi), and vii), shall ensure that each of the units for individual sale will have a relationship to land by way of a parcel identified for common ownership or as a common easement that incorporates a common element (structural or architectural such as an access) of the building to link units located above grade to the ground.
- c) In considering a consent application for stratified tile, the Committee of Adjustment shall require the submission of:
- i) a Draft Reference Plan prepared by an Ontario Land Surveyor and that clearly identifies Parts for individual sale and their relationship to grade, Parts that incorporate common elements, and parts that are provided for easement rights and rights of access (either blanket or specific);
 - ii) a location plan,
 - iii) a site and landscape plan;
 - iv) a Draft Common Elements Agreement prepared by a solicitor authorized to practice law in the Province of Ontario.
- d) Where the Committee of Adjustment upon being satisfied that the matters referred to in a) and b) above are met, and the information required in c) is provided, approves a consent application for stratified title, the Committee of Adjustment shall, at a minimum, impose the following conditions which must be satisfied prior to the registration of any transfer of title as approved by the Committee of Adjustment, to allow for the individual sale of units:
- i) File with the Secretary Treasurer of the Committee of Adjustment, a Common Elements Agreement that has been deposited and registered at the local registry office containing provisions that:
 - acknowledges the co-tenancy interest and sets out a framework for requiring the establishment of a co-tenancy committee to deal with management issues and maintenance of common elements including provisions related to but not limited to meetings of owners, qualifications of committee members, election to and term of office, indemnity of committee members and officers, settlement of disputes, banking arrangements, and management and supervision of repairs and maintenance activities.
 - identifies and/or describes the common areas of the property including driveways, parking areas, landscaped areas,
 - identifies the common areas of the building including structural and common walls, stairwells, corridors, common lobby areas and rooms and the roof identifies the common services and utilities lists the shared common expenses including but not limited to:
 - i) taxes,
 - ii) utility charges (sewers, water, hydro),
 - iii) costs of repairs, replacement, maintenance of the common property,
 - iv) landscaping repairs and maintenance,
 - v) snow removal,
 - vi) maintenance materials, tools and supplies,
 - vii) legal costs and other professional costs,
 - viii) personnel costs to maintain the common property,
 - ix) replacement reserve fund contribution costs,
 - x) costs related to actions to address breaches of the co-tenancy agreement,
 - xi) insurance and indemnification,
 - xii) amount of reserve fund contribution.

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- deals with the assignment of the co-tenancy interest on resale
 - deals with changes to the common property such as but not limited to
 - changes to party walls/supporting walls, foundations and other common structural elements and roofs, changes to grade and the slope of land,
 - interference with drains, and deals with alterations to the exterior visual appearance (harmonization, roofing, finishes and colors).
 - deals with the use of the unit and any restrictions on leasing.
- ii) File with the Secretary Treasurer of the Committee of Adjustment, a written statement of opinion from a solicitor authorized to practice law in the Province of Ontario, that the common elements agreement is binding upon the owners of the land and all subsequent purchasers and deals with the matters referred to in i).
- iii) Have the Common Elements agreement and Draft reference Plan registered on title.
- iv) That all easements as may be required are granted to the satisfaction of the applicable utilities and/or appropriate authorities.
- e) Where a property for which a consent application for stratified title is the subject of an application for a Minor Variance, Site Plan Control Approval, a Zoning By-law Amendment, and/or an Official Plan Amendment, the Committee of Adjustment shall only give approval to the consent application subject to all other required approvals being obtained and being final and binding.

OUTLINE FOR PART A - THE PREAMBLE (details of rationale for proposed OPA)

1.0 PURPOSE

The purpose of the Amendment is to establish a policy framework within Chapter 13 Implementation, that will provide guidance to the Committee of Adjustment in giving consideration to consent applications for stratified or horizontal severance of units within low profile residential, commercial or mixed use buildings.

2.0 LOCATION

The amendment is not property specific but rather adds a new policy that will be applicable throughout the entire City of Ottawa for purposes of implementing Policies of the Official Plan dealing with housing, tenure and affordability, and economic development.

3.0 BASIS

3.1 BACKGROUND

The Centretown affordable Housing Development Corporation in 1997, made an application to the Federation of Canadian Municipalities under the Affordability and Choice Today (ACT) Program for funding a research project to examine the possibility of instituting a concept for stratified severance without the encumbrance of condominium registration with a view to fostering regulatory reform to improve housing delivery and affordability. This application was approved and a freehold strata title working group was established to participate in the study. City of Ottawa staff supported the application by CAHDCO and are members of the working group. Other working group members include individuals representing the legal, survey, regional planning and housing sectors.

3.2 NEED FOR AMENDMENT

The concept of strata title is based on a principal that land can be subdivided in three dimensions, vertical (height) as well as horizontally (length and width). Currently, buildings developed and subdivided under the provincial Condominium Act use the strata title concept, but within the strict framework of condo legislation. Condominiums are suited to larger buildings, containing many units of a similar nature (ie all residential or commercial). The problem encountered in the condominium process is that it is too lengthy and expansive for smaller infill projects which have become much more common than the larger scale projects of the 1970's and 1980's that condo legislation was directed to. A further change in the 1990's in the declining interest in condo ownership by consumers. This is particularly evident in smaller projects, which, within the City of Ottawa are being developed as group building projects in the form of townhouses and where units are severed through the Committee of Adjustment or through the lifting of Part Lot Control and sold as freehold units with common/shared access and common outdoor amenity spaces provided under shared ownership. The strata title concept extends this established practice within the City to also apply to smaller multi unit walk-up developments rather than having severances limited to vertical severances only.

The Strata Title Study in examining the potential for the Committee of Adjustment to give consideration to stratified or horizontal severance requests, is premised on the broad mandate and broad definition of "land" set out in section 45(1) of the Planning Act which establishes the jurisdiction for the Committee of Adjustment. Research also included determining whether other Ontario municipalities had experienced expressions of interest from the development community in pursuing Strata Title severances as an option to condominium approvals, particularly for smaller projects. This confirmed that there is interest in other jurisdictions and confirmed that strata severances are being facilitated within the City of Toronto where the Committee of Adjustment regularly deals with consent applications for strata tile. The only underlying principal that the Toronto Committee of Adjustment requires, to ensure compliance with the Planning Act, is that each parcel created have a direct relationship with land by way of a common building element, which could be a sliver parcel through a stairwell.

The policy framework proposed through this amendment is intended to provide a mechanism for achieving compliance with the Planning Act of Ontario by requiring that each parcel created have a relationship to land and for integrating the various interests of the property such that everyone will have equal rights and obligations of ownership, consistent with the consumer protection principals of the Condominium Act. Further, unlike the City of Toronto where there is no size limit to a project that may be considered for horizontal severance, strata title severances will only be permitted under the proposed OPA for low profile buildings where there is no elevator. This responds to the high degree of interest for strata title for smaller projects and recognizes that larger developments, particularly where major mechanical elements are provided, are more appropriately subdivided through the condo process. This process is also less onerous for larger projects and provides the necessary consumer protection that is required for large developments with numerous owners and with significant structural and mechanical common elements.

3.2 OFFICIAL PLAN POLICIES

The City of Ottawa Official Plan within Chapter 3.0 sets out numerous policies encouraging intensification within existing neighborhoods, accommodating a variety and mix of accommodation suited for different lifestyles and incomes, providing for affordability in housing etc. Policies within Chapter 4.0 support economic development initiatives to diversify Ottawa's economy and to support small and large business ventures. The proposed Official Plan Amendment to provide a framework for strata title is consistent with both housing and economic policy objectives. It supports economical infill development, provides opportunities for ownership which may otherwise not be achievable for both residential units and small

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scale commercial units, responds to market demands for commercial and residential ownership, and supports reduced housing costs and business costs by enabling business owners to own and occupy commercial space within commercial and mixed use buildings.

3.3 DETAILS OF PROPOSED POLICY FRAMEWORK

The proposed Policy framework set out in the Official Plan Amendment clarifies Councils support for the Committee of Adjustment to exercise its authority to grant stratified severances subject to each parcel created having a direct link to land. This is the condition precedent to ensuring compliance with the Planning Act. The proposed policies also detail conditions under which Council will support the Committee of Adjustment in approving strata severances and sets out requirements to be met when strata severance requests are made to the Committee of Adjustment. Finally, conditions that Council will require be imposed by the Committee of Adjustment where they approve a strata severance are set out in detail. These conditions are directed to integrating the various interests of the property such that everyone will have equal rights and obligations of ownership. These conditions are similar to those typically imposed through Part Lot Control Removal or by the Committee of Adjustment where vertical severance of a townhouse project that is developed as a group building project is approved.

RATIONALE FOR RECOMMENDATION 3

Technically, the Land Registry Act and the Planning Act are equipped to handle property division in three dimensions. However, the Planning act does not specifically deal with freehold strata title. Rather, the authority that is provided is embodied in the Planning Act which enables the Committee of Adjustment and/or Land Severance Committee to approve the severance of land where it is determined that a plan of subdivision is not necessary for the orderly development of the municipality. Where the committee is satisfied that a Plan of Subdivision is not necessary, the committee can consider the application having regard to those same matters that Council would have regard to when considering a Plan of Subdivision. Consequently, because a plan of subdivision would not be required when dealing with the horizontal severance of units within a building, the only real guidance that is provided to the committee would be those matters that must be had regard to when dealing with a Plan of Subdivision. While some of these matters are of relevance, many are not. Also there are others considerations that should be had when dealing with stratified severances that are not clearly addressed in the legislation. It is for this reason that it is considered appropriate to request the Province to introduce legislation through an amendment to the Planning Act that would clarify the factors that should be considered by the Committee of Adjustment in dealing with stratified severance requests. Some of the more unique considerations, as detailed in the proposed Official Plan Amendment, deal with ensuring a relationship to land for each parcel created, ensuring common access and rights-of-ways/easements, and requirements for common elements agreements.

Appendix D

Letter From City Of Ottawa Legal Branch

October 28, 1998

OZJ 1100/0200

Soloway, Wright
Barristers & Solicitors
900-427 Laurier Avenue West
Ottawa, Ontario
K1R 7Y2

Attention: Mr. E. Honeywell

Dear Mr. Honeywell:

Subject: Strata Severances

Further to our meeting of September 21, 1998 I have had some research completed on the issue of strata "severances". I have set out below the results of our research as well as some general comments on the feasibility of the approach which you have encouraged the City and the Committee of Adjustment to take.

1. If one looks at the sections of the Planning Act relating to subdivisions and severances, the provisions generally refer to "land". Specifically the information required under the Planning Act when making an application for subdivision approval relates more to the surface of the site - nature of the soil, servicing issues, natural and artificial features such as watercourses ditches and wetlands, layout of the streets and access to existing streets to mention a few. If the Act contemplated some form of strata severance of units, in addition to laying out the lots and blocks, one would have thought that there would have been references to requirements such as identification of the common elements or units within buildings.

2. In Re Crossroads Apartments Ltd. and Phillips (1975) 4 O.R. (2d) 72, Morden J. makes some comments, perhaps obiter, that also question the approach that the strata severance "Project team" is suggesting. On page 78 he states as follows:

"The policy considerations were to the effect that the Planning Act provisions respecting the purpose of controlling the process of subdividing land

.....as well as such matters as conformance of the draft plan to the

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official plan and the adequacy of utilities and municipal services to mention only a few really have *no practical or reasonable application to the sale of space in a building* [emphasis added] which is in all *likelihood* no different from an apartment building in which various parts are leased to tenants. This latter activity, it is submitted, does not, from a legal (apart from leases of 21 years or more) or policy point of view, have any bearing on the requirements or purpose of subdivision control policy."

3. Section 50(2) of the Planning Act states that for the purpose of this section (being the subdivision of land) land shall be deemed and shall always have been deemed not to abut land that is being conveyed or otherwise dealt with if it abuts such land on a horizontal plane only. Troister in Subdivision Control in Ontario states that there has not been any reported judicial interpretation of this section but that it has generally been viewed as the exception permitting an *owner* to grant underground rights without obtaining consent. This supports a position that the subdivision provisions of the Planning Act deal only with "the *ground*" not the space above it.

4. Section 50 (9) of the Planning Act does permit the granting of the use or right in part of a building or structure for any period of years. Admittedly the section was probably intended to clarify that leasehold situations do not trigger a need for a severance but one could argue that a lifetime lease is similar to a conveyance of a unit and that once a part of a building is being dealt with, that no planning issues are at stake and the Planning Act *does* not apply. Therefore a severance is not required *under the Planning Act* for the conveyance of a unit. Horizontal freehold conveyances do not trigger planning issues per se but more "administrative, liability, and contractual issues" that are dealt with *through* the Condominium Act.

5. We have been unable to discover any precedent for residential severances involving stratified *reference* plan of the type being proposed by the strata severance group. The only examples provided to date involve the use of stratified reference plans in major projects where a connection to the land is preserved to bring the application within the scope of the Planning Act. I have also raised the issue at a general "Q and A" session of an association of City Solicitors to *which* I belong and not one member present was aware of any precedent of the nature contemplated.

6. We have also reviewed the history behind the enactment of *condominium* legislation. Our research revealed that although it was legally possible to have condominium ownership at common law, (as you have correctly indicated) there were several problems that prevented condominium ownership at common law – positive covenants to repair or improve the property that run with the land would be unenforceable against subsequent owners, there were issues of liability for each unit owner as an occupier of common property and there were legal and administrative issues relating to separate realty tax assessment and taxation. There is in my view a valid concern that these same issues would re-appear if horizontal severances were permitted outside of the parameters of the Condominium Act.

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7. As I have previously stated, there is a very good argument that the Condominium Act was intended to provide a complete scheme for ownership and management of both individual units and the common elements in situations of horizontal severances. -Mere are no statements in the Act **that** refer to the optional process "under common law" to provide for Freehold ownership of units above ground.

8. Although admittedly it is more an issue for the developer and his/her solicitor, there is also a concern that both prospective purchasers and their lawyers would hesitate to make the significant investment in a purchase of the proposed type of freehold unit where the legal underpinnings are not unanimously accepted by the legal community. The granting of strata severances of the nature contemplated would very possibly involve the City in legal challenges to the validity of such severances either immediately or sometime in the future *when a project runs into financial difficulty*.

Although I accept that you have raised some persuasive legal arguments to support the innovative proposals of your group, I am not satisfied that, for the reasons set out above, the issue is conclusive enough to warrant either the City or the Committee of Adjustment taking the risk involved in giving "official sanction" to this *form of severance*. *In my opinion* such a change in *the commonly* accepted form of transfer of freehold title requires legislative sanction from the provincial government.

Yours truly,

J. Jerald Bellomo
City Solicitor

JJB:db
Strata.wpd

cc: S. Wilder, Planning, UPPW
H. MacLean, Committee of Adjustment