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Owning and Dissolving Strata Property

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OWNING AND DISSOLVING STRATA PROPERTY

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PART I: DISSOLVING TWELVE OAKS

Twelve Oaks is a three-storey, 30-unit strata property complex located near the general hospital in the City of Vancouver (Figure 1). The residential, wood-frame building was constructed in 1973 on several lots that had been occupied by a gas station, a small apartment building, and a house.[1] The developer built the complex to sell the individual units, and in 1974 it finalized the property arrangements with the deposit of Strata Plan VR140 (the "plan") in the land title office (Figure 2). The plan created separate, fee simple interests in each of 30 strata lots, established the owners of those strata lots as tenants-in-common of the common property, and allotted each owner a vote in the strata corporation that governed the complex.

Twelve Oaks was among the early strata property developments in Vancouver. In 1966, British Columbia had become the first province in Canada to enact a statute-based template for condominium property when it passed the *Strata Titles Act*.[2] At first, the template was little used, but by the early 1970s developers, financers, and purchasers had become increasingly comfortable with strata property as a legal architecture for

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1 See *Fire Insurance Map 1954-1966* (map 610), City of Vancouver Archives, vol II, sheet no 268.

2 SBC 1966, c 46.

ownership in multi-unit buildings. Twelve Oaks was on the leading edge of a condominium wave that would sweep across much of the city in the decades that followed.[3]

In 2017, Twelve Oaks became the first strata corporation under British Columbia's new strata property dissolution rules to secure a court order confirming its resolution to cancel the strata plan, wind up the strata corporation, and establish the strata lot owners as tenants-in-common of all the property that had been within the strata property development.[4] The British Columbia Supreme Court (BCSC) also confirmed the appointment of a liquidator, the surrender of each owner's co-ownership interest to the liquidator, and the authority of the liquidator to proceed with the sale of the property. A purchase agreement with a land developer was already in place, and it was this agreement that precipitated the vote to dissolve Twelve Oaks. The developer's $21.5 million offer was almost exactly twice the cumulative assessed value of the 30 strata lots.[5]

Once the strata plan is cancelled, the individual lots terminated, and the owners paid for their fractional shares, the Twelve Oaks building will be demolished. It is likely that a larger, denser residential strata property development will arise on its site to take advantage of municipal zoning that allows for residential high-rise structures.[6] Given the central location, the cost of the land, and the opportunity for greater return from an "upscale"

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3 See Douglas C Harris, "Condominium and the City: The Rise of Property in Vancouver" (2011) 36:3 Law & Soc Inquiry 694. British Columbia uses "strata property" instead of the more widely adopted "condominium" to describe the same arrangement of land ownership.

4 See *The Owners, Strata Plan VR140 v Harrison* (27 March 2017), Vancouver, BCSC S-1611558 (Court Order) at 2 [*Twelve Oaks*]. In this paper, I use "dissolution" to describe the process of cancelling a strata plan, winding up the strata corporation, and converting individual ownership of separate parcels to tenancies-in-common of the whole.

5 See *The Owners, Strata Plan VR140 v Harrison* (14 December 2016), Vancouver, BCSC S-1611558 (Petition) at 7 [*Twelve Oaks* Petition].

6 Under the City of Vancouver, by-law No 3575, *Zoning and Development By-law* (14 June 2016), RM-3 District Schedule at 1, Twelve Oaks occupies land that is zoned RM-3, which is described as follows: "[t]he intent . . . is to permit medium density residential development, including high-rise apartment buildings".

development, the new units, will be marketed at a cost per square foot well above what it would have cost to acquire a unit in Twelve Oaks. As a result, a significantly more affluent group of owners than those who owned within Twelve Oaks will become the members of the next strata corporation.

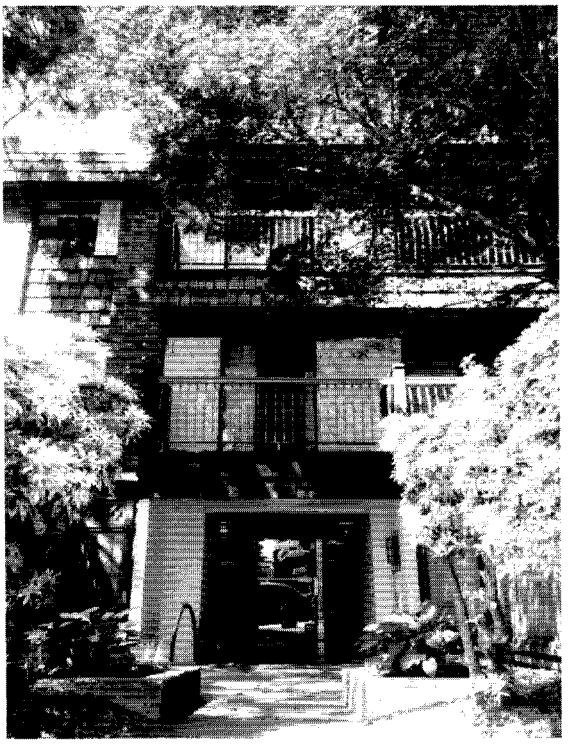

Figure 1 The main entrance to Twelve Oaks, May 2017. (Photo credit: Özgecan Yazar, used with permission.)

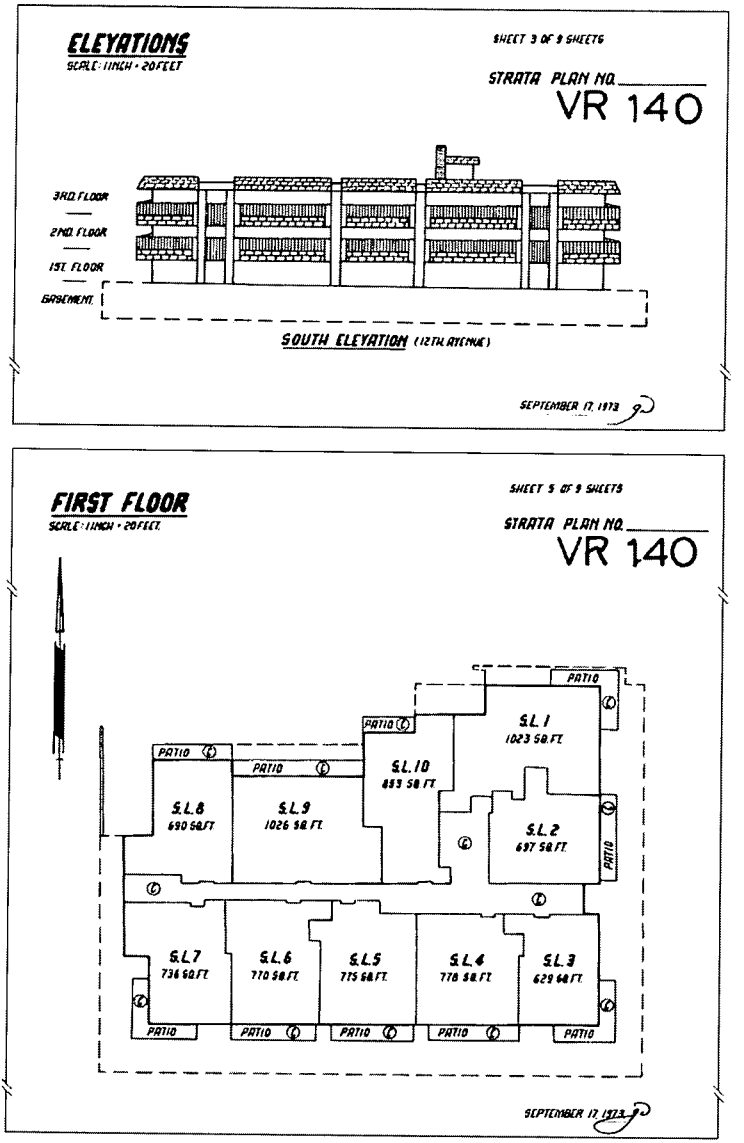

Figure 2 Portions of two sheets from Strata Plan VR140 showing the South Elevation of the three-storey building and the First Floor layout, including ten strata lots and common property.

The vote by the owners to dissolve Twelve Oaks, and thus terminate the separate fee simple interests in the 30 strata lots, was not unanimous. Twenty-eight owners (93.3 percent) voted in favour; two were opposed.[7] Until 2016, this opposition might have doomed the effort to dissolve Twelve Oaks and make a collective sale. British Columbia's *Strata Property Act* (the "*Act*") required the unanimous consent of owners or a court order to dissolve strata property.[8] However, with a set of amendments in 2015, which came into force in 2016, the provincial government reduced the dissolution vote threshold to 80 percent of owners.[9] The vote at Twelve Oaks was comfortably above this reduced threshold, and by the time the BCSC heard the strata corporation's application to confirm the resolution, several months after the dissolution vote, nobody appeared in person to oppose it. One owner who had lived in the building for nearly 40 years, who had recently renovated his unit, and who suffered from a serious illness that made moving difficult, had voted against the sale, but subsequently resigned himself to it.[10] Another owner objected to the distribution of proceeds from the proposed sale and sought a different accounting of the strata lot value, but did not appear at the hearing to oppose the application.[11] As a result, the Court did not hear dissenting voices.

British Columbia's *Strata Property Act* requires that strata corporations containing five or more strata lots secure confirmation of dissolution resolutions from the BCSC.[12] The legislation also provides that "[a]n owner, a mortgagee of a strata lot, or any other person the Supreme court considers appropriate" may apply to the BCSC for an order to dissolve

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7 See *Twelve Oaks* Petition, *supra* note 5 at 7–8.

8 SBC 1998, c 43, s 272(1) [*SPA*], before amended by the *Natural Gas Development Statutes Amendment Act, 2015*, SBC 2015, c 40 [*Natural Gas Act*].

9 See *ibid*, s 272(1).

10 See Glen Korstrom, "Court Approves First Condominium Sale under Bill 40", *Business in Vancouver* (27 March 2017), online: <www.biv.com>.

11 *The Owners, Strata Plan VR140 v Harrison* (2 January 2017), Vancouver, BCSC S-1611558 (Response to Petition).

12 *SPA*, *supra* note 8, ss 273.1, 278.1.

strata property even where the 80 percent threshold has not been met.[13] As a result, the courts will review the dissolution of all strata property, except those developments with fewer than five units where the owners unanimously support dissolution.[14]

Moreover, the volume of strata property dissolution applications seems certain to increase. Just as Twelve Oaks was at the leading edge of condominium development in Vancouver, it is now at the forefront of the efforts to dissolve those early associations of owners. Indeed, the day after the BCSC confirmed the dissolution in Twelve Oaks, it confirmed the dissolution vote of the Brandywine strata property development in the Vancouver suburb of Coquitlam.[15] The circumstances were similar: an aging building that required extensive and expensive renovation and a developer's offer substantially above the cumulative assessed value of the individual strata lots.[16] Support for dissolution among the 58 Brandywine owners exceeded the 80 percent threshold, but nine owners (15.5 percent) had voted against it (a significantly larger block than the two who had voted against dissolution in Twelve Oaks), although none of the owners contested the application to confirm the vote.

As the proportion of owners within a strata corporation who oppose dissolution and collective sale grows, so too the likelihood increases that the courts will hear vigorously contested dissolution applications. Indeed, the efforts to dissolve two common law condominium developments in Metro Vancouver led to protracted disputes and extensive litigation between owners,[17] and most recently, the BCSC denied an application to confirm a

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13 See *ibid*, s 284.

14 The owners of strata lots in small strata property developments may still seek out court confirmation of a dissolution vote, even if there is unanimous consent to dissolve the strata property.

15 See *Re: The Owners, Strata Plan NW 698 In the Matter of Section 278.1 of the Strata Property Act, SBC 1998, c 43* (28 March 2017) Vancouver, BCSC S-171277 (Court Order) at 1-2.

16 See Glen Korstrom, "Coquitlam Strata Corporation Seeks Dissolution under Bill 40", *Business in Vancouver* (14 February 2017), online: <www.biv.com>.

17 See *Mowat v Dudas*, 2012 BCSC 454, [2012] BCWLD 5292 [*Mowat*]; *McRae v Seymour Village Management Inc*, 2014 BCSC 714, [2014] BCWLD 4545 [*McRae*].

dissolution vote in the first contested hearing under the new dissolution rules.[18] This case involved another three-storey, wood-frame building, known as Bel-Aire Villa, only 1.5 kilometres from Twelve Oaks. At the dissolution vote, 30 of the 36 owners (83.3 percent) voted in favour of dissolution, and two more indicated their support after the vote.[19] One owner opposed the application to confirm the dissolution vote, precipitating the first judicial analysis of the amended dissolution rules.

In anticipation of contested attempts to dissolve strata property, British Columbia's *Strata Property Act* directs the courts to consider certain factors. Whether asked to confirm a resolution supported by at least 80 percent of owners, or to order dissolution based on a petition from owners where that threshold has not been met, the courts are to consider "the best interests of the owners,"[20] and the probability and extent of "significant unfairness"[21] to owners and their creditors or of "significant confusion and uncertainty in the affairs of the strata corporation or of the owners"[22] if the order is granted or not granted. This is the framework within which the courts must decide whether or not to approve the dissolution of strata property.

This article does several things. In Part II, it steps back from the details of the statutory dissolution and collective sale provisions, and from the particular disputes outlined above to describe what is at stake in the choice between a dissolution regime that presumes the need for unanimous consent among owners and one that presumes supermajority approval is sufficient to dissolve strata property. In brief, the choice between dissolution regimes is also a choice between protecting the capacity of

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For an analysis of these cases see Douglas C Harris & Nicole Gilewicz, "Dissolving Condominium, Private Takings, and the Nature of Property" in B Hoops et al, eds, *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven International Publishing, 2015) 263.

18 *Re: The Owners, Strata Plan VR 1966 In the Matter of Section 278.1 of the Strata Property Act, SBC 1998, c 43* [*Strata Plan VR 1966*].

19 *Ibid* at paras 24–25.

20 *Supra* note 8, ss 273.1(5)(a), 278.1(5)(a), 284(3)(a).

21 *Ibid*, ss 273.1(5)(b)(i), 278.1(5)(b)(1), 284(3)(b)(i).

22 *Ibid*, ss 273.1(5)(b)(ii), 278.1(5)(b)(ii), 284(3)(b)(ii).

owners to remain owners, or enhancing their ability to maximize the exchange value of property interests. This choice becomes clear when nonconsensual dissolution, which results in the termination of individual property interests, is understood as a taking of property. A regime that facilitates the capacity of a majority to take the property interests of a dissenting minority enables strata property owners to maximize the exchange value of their interests, but at the cost of dispossessing the minority. Some owners who do not wish to transfer their interests will be forced to do so. Moreover, while the dissolution vote threshold is a particularly important determinant of the character of property in a strata property regime, the courts will also be deciding whether to defend continuing ownership or to enhance the ability to maximize exchange value when they decide contested dissolution cases.

Having established that the workings of the dissolution regime involve basic choices about the nature of strata property, Parts III and IV turn to an analysis of the role of the courts in the former and current dissolution regimes in British Columbia. The former dissolution regime, in place 2000–16, required unanimous consent or a court order to dissolve strata property. The discussion of this regime in Part III is brief, reflecting the fact that dissolution was difficult and the provisions were lightly used. In Part IV, the article shifts to the newly adopted rules establishing the 80 percent threshold for strata property dissolution and to an analysis of the provisions set out in the *Strata Property Act* that guide the courts when hearing contested applications. Although the analysis focuses on British Columbia and the details of its statute, other jurisdictions with supermajority thresholds have also inserted a requirement that courts confirm a supermajority vote to give it effect.[23] The courts in those jurisdictions will be working within different statutory frames, but they will confront the same basic questions about what the strata property regime is designed to protect: continuing ownership or investment?

The concluding Part V offers several predictions and prescriptions for how the courts will and should interpret their role. The predictions are based on the language in the *Strata Property Act* and an interpretation of

[23] See the discussion in Part V, beginning *infra* note 54.

the case law. The prescriptions are based on the argument in Part II that when courts rule in contested dissolution cases, they make basic choices about whether to protect the capacity of owners to maximize the exchange value of property or to remain as owners. As a result, the crucial and preliminary step for the courts when ruling in these cases is to recognize that fundamental choices about the nature of property ownership and its social purposes confront them. Then, in making these choices, the courts must be attentive to the social and economic context in which they are ruling. The statutory direction to consider "best interests" and the probability and extent of "significant unfairness" requires this attention. In recent years, that context includes an unparalleled escalation of property values in British Columbia's urban centres. As a result, many who once expected to be owners of their homes now find ownership beyond reach, and this fact has created the perception of crisis in the availability of affordable housing. The courts must account for this context, but also recognize that they are shaping it when they choose whether or not to authorize a taking of property in order to facilitate the maximization of exchange value over the protection of home.

PART II: OWNING AND DISSOLVING STRATA PROPERTY

When owners within strata property unanimously support dissolution, the process of breaking apart the constituent elements of strata property ownership is relatively straightforward, as it eventually proved to be for Twelve Oaks. Although membership in a strata corporation is a mandatory feature of strata property ownership, strata property constructs a voluntary association of owners in the sense that the owners may voluntarily disband the association. However, when there is no consensus, the statutory provisions and the courts become particularly important to the outcome. The successful dissolution of strata property will depend on the required threshold for consent in the legislation and the willingness of the courts to order dissolution when some owners are opposed.

Moreover, the legal framework for dissolving strata property impacts not only individual outcomes or the general likelihood of dissolution, but also the character of ownership within strata property. A regime that presumes the need for unanimous consent to dissolve strata property creates a different conception of ownership and establishes different social

purposes for ownership than one based on supermajority approval. This constitutive power to define property and its purposes lies not only in the statutory provisions, which set the threshold for dissolution votes, but also in the decisions of the courts to approve or block nonconsensual dissolution. The courts will determine the circumstances in which dissolution may proceed, and in doing so, will establish what ownership protects. This becomes apparent when nonconsensual dissolution is understood as taking of property.[24]

The deposit of a strata plan, as the constituting document of strata property, brings the multiple fee simple interests within a strata property development into existence; the cancellation of that plan—one of the acts in dissolution—terminates those same fee simple interests. As a result, those owners who precipitate nonconsensual dissolution are forcing the termination of fee simple interests in individual strata lots held by other owners, and thus are stripping property interests from those who oppose dissolution. In this sense, nonconsensual dissolution enables a form of "delegated private takings"[25] or "private-to-private takings"[26] in which one group of owners dissolves a strata property complex and thus terminates the property interests within it, including those of nonconsenting owners. This termination amounts to a taking of property from those who oppose dissolution.[27]

On dissolution, the former owners of individual strata lots become tenants-in-common of the property that had been within strata property. Each holds an undivided share (or fractional interest) of the whole. This conversion of individual interests into undivided shares of common property serves as compensation for the loss of individual interests.

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[24] This argument is developed more fully in Harris & Gilewicz, *supra* note 17.

[25] Abraham Bell, "Private Takings" (2009) 76:2 U Chicago L Rev 517 at 545–48.

[26] Emma JL Waring, "Private-to-Private Takings and the Stability of Property" (2013) 24:2 King's LJ 237 at 238.

[27] AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Cape Town: Juta & Co, 1999) at 18, notes that "takings" include the limiting or termination of property interests and do not also require the acquisition of those interests, as is the case with other common terms such as "expropriation" or "compulsory acquisitions".

Moreover, converting individual interests within strata property to co-ownership interests outside strata property usually maximizes the compensation that owners receive for the loss of their individual property interests. This is because the impetus for dissolution is almost always that the exchange value of the co-ownership interests is greater than that of the individual interests within the strata property development. This occurs most commonly in inflating property markets, such as Vancouver's in the past decade, where rising land values spur redevelopment, but it also occurs in deflating markets where large inventories of unsold units create pressure to "deconvert" condominium buildings to rental buildings.[28] Aging buildings are also susceptible to dissolution because increasing maintenance and the need for substantial renovations prompt owners to ask whether it is in their financial interest to incur those costs. Whatever the combination of pressures, the incentive to dissolve the existing structure of ownership is a function of the desire to maximize the exchange value of property interests. As a result, dissolution regimes that enhance the capacity of a majority of owners to take the property of a minority serve to maximize the exchange value of property interests for all owners. The fact that all owners maximize the exchange value of their property does not alter the fact that those who oppose dissolution suffer an involuntary loss of property.

Justice Milman's decision not to confirm the Bel-Aire Villa strata property dissolution vote turns on this point. Non-consensual dissolution of strata property, he concluded, amounts to "an involuntary taking of a

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[28] This process has been labelled "condominium deconversion" because it commonly occurs in buildings that were already converted from rental to condominium. The impetus to deconvert arises when demand for condominium softens (see Deborah Goonan, "Can Hostile Takeovers of Condominium Associations Be Prevented" (2 January 2017), *Independent American Communities* (blog), online: <independentamericancommunities.com/2017/01/02/can-hostile-takeovers-of-condominium-associations-be-prevented) and/or the rental market strengthens (see Gail Marks Jarvis, "Deconverting Condos Feeds Renters' Growing Demand", *Chicago Tribune* (24 June 2016), online: <www.chicagotribune.com>. See also Antwan D Hampton, *Rapid Regime Responses: An Urban Regime Analysis of Chicago's and Miami's Policy Responses to an Emerging Housing Crisis* (PhD Thesis, Northern Illinois University Department of Political Science, 2013) (ProQuest).

home."[29] Where the taking of property is authorized by statute, he continued, the courts will apply the statutory requirements strictly.[30] As a result, the Bel-Aire Villa strata corporation's failure to provide a statement estimating the value of the owners' interests following dissolution, as required under the *Strata Property Act*, invalidated the dissolution vote even though the absence of the information did not appear to have caused prejudice.[31] In short, the process must be unimpeachable, at least when measured against the statutory requirements, because it results in the taking of property.

Describing nonconsensual dissolution of strata property as a private-to-private taking reveals the fundamental nature of the shift in ownership when a jurisdiction swings, as British Columbia has done, from a system that presumed the need for unanimous consent to dissolve strata property to one that presumes supermajority approval is sufficient. The former protects property by requiring an owner's consent to its transfer; the latter protects property by ensuring compensation for the loss of property.[32] Where dissolution may occur with supermajority approval, individual property interests within strata property are protected primarily by the extent to which owners will vote to dissolve strata property (and thus to terminate individual interests) only if the exchange value of those property interests is greater after dissolution than it is within strata property. In short, property interests are protected by a right to compensation, not by

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29 *Supra* note 18 at para 41.

30 *Ibid.*

31 *Ibid* at para 42.

32 This is the distinction between property rules and liability rules articulated by Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089 at 1106–10. See the discussion in Harris & Gilewicz, *supra* note 16 at 284–86. Lawrence Troy et al, "'It Depends What You Mean by the Term Rights': Strata Termination and Housing Rights" (2017) 32:1 Housing Studies 1 at 13, describe this as "[a] tension between what is seen as a legal right to profit from redevelopment and [a] right to be protected from forced dispossession".

the capacity of an owner to insist on consent. As Carol Rose suggests, these different ways of protecting property create different property interests.[33]

The prospect of nonconsensual dissolution also raises an even more fundamental question about the social functions of land ownership.[34] Should a property interest in land protect the capacity of owners to remain owners, or should it protect the opportunity to maximize the exchange value of land? The choice between these different social roles of property ownership is most pronounced in the choice between unanimity and supermajority regimes, but the courts are making similar choices when they determine the extent to which they will scrutinize, and the circumstances in which they will confirm or block nonconsensual dissolution.

PART III: UNANIMOUS CONSENT OR A COURT ORDER TO DISSOLVE STRATA PROPERTY

Until 2015, British Columbia chose to protect the capacity of owners to continue as owners within strata property through a dissolution regime that required a unanimous vote to cancel the strata plan, wind up the strata corporation, and designate the owners as tenants-in-common of all the private and common land formerly within the strata property development.[35] In doing so, the legislation established a presumption that owners must consent to the transfer of their property. However, there were

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[33] Carol M Rose, "Property and Expropriation: Themes and Variations in American Law" (2000) 2000:1 Utah L Rev 1 at 10.

[34] On the dichotomy between social functions of property in land, see Carol M Rose, "'Takings' and the Practices of Property: Property as Wealth, Property as 'Propriety'" in Carol M Rose, ed, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994) 49; Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: The University of Chicago Press, 1997); Joseph William Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30:2 Harv Envtl L Rev 309.

[35] See the British Columbia Law Institute, *Report on Terminating a Strata*, BCLI Report No 79 (Vancouver: BCLI, 2015) at 9–36 [BCLI, *Terminating a Strata*], on the history of strata property dissolution regimes in British Columbia and the details of the regime in place from 2000–16.

two options for those owners who sought dissolution where unanimity among owners proved elusive.

First, on the strength of a 75 percent vote, a strata corporation might apply to the BCSC for an order that a vote requiring unanimous consent "proceed as if the dissenting voter or voters had no vote."[36] In short, the courts could (and still can) deem a non-unanimous vote to be unanimous "if satisfied that the passage of the resolution is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter or voters"[37] and if those opposed amount to less than 5 percent of eligible voters.[38] The only reported case under this provision involved a 21-unit strata property development in which one owner had not voted and, although not opposed to the 20 owners who had voted to dissolve the strata property, simply took no position.[39] As a result, the case did not require the court to develop an analysis of best interests or unfair prejudice, and the reasons for decision provide little guidance about the willingness of courts to deem a non-unanimous vote to be unanimous where some owners are opposed. The absence of other reported decisions suggests the provision was little used.

Alternatively, any owner could apply to the BCSC for an order to wind up the strata corporation and appoint a liquidator to sell the property.[40] These applications, made by owners rather than by a strata corporation on behalf of owners, did not require a minimum threshold. In these instances, the *Strata Property Act* instructed the courts to ask if "the winding up would be in the best interests of the owners, registered charge holders and other creditors."[41] In determining "best interests", the legislation directed the

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36 *SPA*, *supra* note 8, s 52(3).

37 *Ibid.*

38 *Ibid*, s 52(2).

39 See *The Owners, Strata Plan NW422 v. Khlybov*, 2016 BCSC 285 at para 4, [2016] BCWLD 1870.

40 See *SPA*, *supra* note 8, s 284, before amended by the *Natural Gas Act*, *supra* note 8.

41 *Ibid*, s 284(2).

courts to consider "the scheme and intent"[42] of the *Strata Property Act*, "the probability of unfairness to one or more owners, registered charge holders or other creditors, if winding up is not ordered",[43] and "the probability of confusion and uncertainty in the affairs of the strata corporation or the owners if winding up is not ordered."[44]

The only reported judicial consideration of these provisions appears in *Buchanan v S.P. VR 1411*,[45] a case involving a triplex development in Vancouver in which two owners sought to dissolve the strata corporation over the objections of the third. A lack of agreement about the need for renovations and the allocation of renovation expenses had led the owners to court on multiple occasions. On the dissolution application, Justice Curtis found that not granting the order would be unfair to the two owners who sought the order (and probably to the owner who opposed the order)[46] because "the cost of repairs . . . will likely significantly exceed the associated increase in value",[47] and because none of the owners appeared to have the funds to cover those costs.[48] Justice Curtis also determined "that the probability of confusion and uncertainty if winding up is not ordered very significantly exceeds the probable extent of those factors if it is."[49] He described the strata property as "dysfunctional both on a structural and organizational level",[50] and seemed to think there was little prospect that the parties could resolve this dysfunction if consigned to remain owners within the strata corporation. However, he withheld the dissolution order to allow

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42 *Ibid*, 284(3)(a).

43 *Ibid*, 284(3)(b).

44 *Ibid*, 284(3)(c).

45 2008 BCSC 977, [2009] BCWLD 1507 [*Buchanan*].

46 See *ibid* at para 38.

47 *Ibid* at para 34.

48 See *ibid* at para 36.

49 *Ibid* at para 38.

50 *Ibid* at para 37.

the parties "to contemplate the possibilities as there may be better ways to realize their respective interests."[51]

While *Buchanan* provides an example of the application of the dissolution rules, it offers little general guidance for interpreting the provisions. The fact that it is the only reported case under a regime that required either unanimous consent among strata lot owners or a court order to dissolve a strata property development may indicate just how difficult this regime made it to dissolve strata property. That difficulty was certainly part of the impetus for the province's shift to a supermajority regime.[52]

PART IV: SUPERMAJORITY APPROVAL AND A COURT ORDER TO DISSOLVE STRATA PROPERTY

Beginning in 2016, a strata corporation in British Columbia may seek to dissolve strata property with the support of as few as 80 percent of the owners.[53] In shifting from a regime that presumed the need for unanimous consent to dissolve strata property, to one that presumes the sufficiency of supermajority approval, British Columbia followed other statutory condominium jurisdictions that have made a similar change.[54] Still other jurisdictions are studying or in varying stages of implementing strata property dissolution based on supermajority approval.[55] The Australian

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51 *Ibid* at para 39.

52 See the recommendations in BCLI, *Terminating a Strata*, *supra* note 35 at 51–55.

53 See *SPA*, *supra* note 8, as amended by *Natural Gas Act*, *supra* note 8, ss 37–55. The amendments came into force 28 July 2016 (BC Reg 206/2016).

54 Singapore introduced supermajority thresholds of 80 or 90 percent, depending on the age of the building, in 1999. See *Land Titles (Strata) (Amendment) Act 1999* (No 21 of 1999, Sing), s 8; Kah Leng Ter, "A Man's Home is [Not] His Castle—*En Bloc* Collective Sales in Singapore" (2008) 20:1 Sing Ac LJ 49; Teo Keang Sood, "Collective Sales in Singapore" (2010) 22 Sing Ac LJ 66. Florida adopted an 80 percent threshold in 2007. See Fla Stat tit XL § 718.117 (2007). See the overview of Canadian approaches in BCLI, *Terminating a Strata*, *supra* note 35 at 37–40. Cornelius Van Der Merwe, ed, *European Condominium Law* (Cambridge: Cambridge University Press, 2015) at 525–26, 531–32, surveys the range of approaches in Europe.

55 See the proposals to amend strata property from the Austl, Qld, Commercial and Property Law Research Centre, Queensland University of Technology, *Government*

state of New South Wales, which created the strata property model that British Columbia emulated fifty years ago, has just introduced a 75 percent "strata renewal" threshold.[56] In the United States, the Uniform Law Commission's Uniform Common Interest Ownership Act recommends that states adopt an 80 percent threshold, although it also suggests that residential common interest communities, including condominium developments, have the option of raising that threshold.[57]

The dissolution regimes that presume the sufficiency of supermajority approval make the nonconsensual dissolution of strata property, and thus the taking of property from those who oppose dissolution, more likely. Perhaps in recognition of the inherent dangers to the security of tenure that accompany the capacity of a majority to terminate the property interests of an unwilling minority, the amendments to British Columbia's *Strata Property Act* include a requirement that strata corporations with five or more strata lots secure confirmation from the BCSC of resolutions to dissolve strata property.[58] The possibility also remains for individual owners to apply to the BCSC for an order to wind up a strata corporation even

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Property Law Review: Options Paper Recommendations Body Corporate Governance Issues: By-laws, Debt Recovery and Scheme Termination by William Duncan et al (Brisbane: Commercial and Property Law Research Centre, 2017) at 55–83; Western Australian Land Information Authority, "Safeguards for the Termination of Schemes" (11 May 2017), online: <www0.landgate.wa.gov.au/titles-and-surveys/strata-reform/termination-of-schemes>.

[56] See *Strata Schemes Development Act 2015* (NSW), Part 10 ("Strata Renewal Process for Freehold Strata Schemes") [*SSDA 2015*]. Section 154 defines the "required level of support" for strata renewal as "the owner or owners of at least 75% of the lots" (*ibid*).

[57] US, National Conference of Commissioners on Uniform State Laws, *Uniform Common Interest Ownership Act* (Big Sky: Uniform Law Commission, 2008) at 100:

> Section 2-118....
>
> (a)... a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies, and with any other approvals required by the declaration. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses.

[58] *Supra* note 8, ss 273.1, 278.1.

without an 80 percent vote in favour of dissolution.[59] As a result, it is only those strata property developments with fewer than five strata lots where all owners support dissolution that will not require judicial scrutiny. The dissolution of all other strata property will come before the courts. This means that the manner in which the courts interpret and fulfill their role will have a significant impact on the extent of nonconsensual dissolution and the circumstances in which it proceeds.[60]

In British Columbia, whether hearing a request from a strata corporation to confirm a dissolution vote of at least 80 percent of owners, or a petition from individual owners for an order to dissolve strata property, the *Strata Property Act* directs the courts to consider the following factors:

- "the best interests of the owners";
- the probability and extent of "significant unfairness to one or more" owners, registered charge holders, or, in the case of the appointment of a liquidator, other creditors; and
- the probability and extent of "significant confusion and uncertainty in the affairs of the strata corporation or of the owners."[61]

These factors are similar to those that the courts were to consider when hearing applications to dissolve strata property under the former regime, but the structure of the instructions is different. Instead of analyzing "unfairness" and "confusion and uncertainty" as elements within an analysis of best interests, the amended *Act* lists each of these factors as a separate consideration.

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[59] *Ibid*, s 284.

[60] The analysis that follows focuses on British Columbia, but several other jurisdictions with supermajority thresholds also require court confirmation of the dissolution vote. In New South Wales, a strata renewal plan lapses if an owners corporation does not apply to court for an order to give effect to the plan. See *SSDA 2015*, *supra* note 56, s 177.

[61] *Supra* note 8, ss 273.1(5), 278.1(5), 284(3). The principal difference between these provisions is that sections 278.1 and 284 direct the courts to consider the probability and extent of significant unfairness to "(C) other creditors" as well as "(A) owners" and "(B) holders of registered charges" when considering an order to dissolve coupled with the appointment of a liquidator with the authority to sell the assets formerly within strata property (*ibid*).

A. BEST INTERESTS OF THE OWNERS

How are the courts to interpret the directive to consider "the best interests of the owners" in a dissolution hearing? The *Strata Property Act* does not provide additional guidance, but the courts have used "best interests" to guide their decision-making when ruling on disputes involving a strata corporation's responsibility "for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners."[62] Where the interests of owners align, this responsibility is relatively straightforward, but when they diverge, a strata corporation will make decisions that benefit some owners and disadvantage others. In *Gentis v The Owners, Strata Plan VR 368*,[63] a case involving a dispute between owners over the use of common property, the BCSC ruled that strata corporations "must consider, and act in, the best interests of all the owners."[64] In doing so, it cited an earlier statement from the BCSC in *Sterloff v Strata Plan VR 2613*[65] that strata corporations "must endeavour to accomplish the greatest good for the greatest number" when managing common property.[66] In these passages, the courts recognize that the "best interests of all the owners" may not be in the best interests of each individual owner and, where interests conflict, that the strata corporation should act in the collective best interest.

The focus on collective best interest arises from cases dealing with the responsibility of strata corporations for common property. They present significantly different scenarios than strata property dissolution, which involves acting on, and indeed terminating, private interests in individual strata lots. As a result, although the goal articulated in *Sterloff* of achieving the "greatest good for the greatest number" is relevant in assessing the content of "the best interests of the owners", and a supermajority in favour of dissolution is compelling evidence of the collective good, it is not likely

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62 *Ibid*, s 3.

63 2003 BCSC 120, [2003] BCWLD 307 [*Gentis*].

64 *Ibid* at para 24.

65 [1994] BCWLD 813, 1994 CanLII 1011 [*Sterloff*].

66 *Ibid* at 11.

determinative. Nor should it be. When considering the decision of a majority to terminate the property interests of everyone, including a nonconsenting minority, the courts should consider individual as well as collective best interests.

A similar caution applies when assessing the relevance of the judicial interpretation of "best interests" in that part of the *Strata Property Act* dealing with the duties of strata council members. The members of strata councils (the elected officers of strata corporations) must "act honestly and in good faith with a view to the best interests of the strata corporation".[67] This statutory duty of care, which mirrors that of corporate directors and officers set out in the *Canada Business Corporations Act*,[68] protects the best interests of strata corporations as separate entities rather than the interests of the owners themselves. Moreover, it targets strata council members who act for the strata corporation, but to further their personal interests to the detriment of the strata corporation.[69] As a result, the judicial consideration of "best interests" in these cases focuses on the conflicts of interest that cause strata council members to displace the collective interest with their individual interests. In this context, the courts reiterate that the interests of the strata corporation, as a separate entity, cannot be ignored.

The existing interpretations of "best interests" focus on the uses of common property or on the strata corporation as an independent entity. In both these circumstances, the courts interpret "best interests" in a manner that protects the collective good. This is entirely appropriate in these contexts, and the collective good is certainly a relevant consideration in the dissolution of strata property. Moreover, it seems likely that a dissolution vote which achieves the 80 percent threshold will place the principal burden of establishing that it is not in the best interests of the owners to proceed with dissolution on those opposed to dissolution. Conversely, in circumstances where the 80 percent threshold has not been met, those seeking dissolution will bear the principal burden of establishing that it is in

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67 *SPA*, *supra* note 8, s 31.

68 RSC 1985, c C-44, s 122(1)(a).

69 See *Dockside Brewing Co Ltd v Strata Plan LMS 3837*, 2007 BCCA 183, [2007] BCWLD 5254.

the best interest of the owners to cancel the strata plan, terminate the property interests, and wind up the strata corporation. In either case, the burden will be substantial.

However, the analysis of "best interests" should not be reduced to collective best interests when it comes to non-consensual dissolution and the involuntary loss of individual interests in land. Put another way, the fact that a strata corporation has met the 80 percent threshold and that a supermajority of owners supports dissolution should not be determinative of best interests. In this context, the owners are asking the courts not just to resolve a dispute about the uses of common property, but to condone the taking of property interests from a minority of owners who oppose dissolution. The taking of individual property interests requires attention to individual circumstances and to the particular disadvantage that the loss of property might cause. Extreme disadvantage to a minority because of the involuntary loss of property could well be grounds for a court to deny confirmation of a dissolution resolution because it was not in the "best interests of the owners", even where a supermajority of owners was in support.

B. SIGNIFICANT UNFAIRNESS

That courts should extend their analysis beyond the collective interests of strata property owners and focus attention on individual owners is even clearer in the statutory direction that they consider the probability of "significant unfairness to one or more (A) owners, or (B) holders of registered charges"[70] when reviewing dissolution applications. Where a liquidator is retained to facilitate the sale of the a property, the legislation also directs the courts to consider significant unfairness to a third category of interested parties: "(C) other creditors".[71] These provisions instruct the courts specifically to consider individuals, not just the collective, and they raise the possibility that significant unfairness to a single owner, charge holder, or creditor may warrant a decision either to order, or not to order, dissolution.

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[70] *SPA*, *supra* note 8, s 273.1(5)(b)(i).

[71] *Ibid*, ss 278.1(5)(b)(i), 284(3)(b)(i).

The *Act* provides little additional guidance to the courts on how to interpret significant unfairness, but the judicial interpretation of a similar phrase elsewhere in the *Act* is relevant. In particular, owners or tenants may apply to the BCSC to prevent or to remedy actions of a strata corporation that are "significantly unfair".[72] This provision creates a standard against which to measure the behaviour of strata corporations and, by doing so, protects individuals and their interests from acts in breach of that standard. In fact, the capacity to seek remedies for actions that are significantly unfair serves as the principal protection for individual owners against the inappropriate use of majoritarian power within strata property.

The courts have elaborated on the "significantly unfair" standard in a series of cases, including *Reid v The Owners, Strata Plan LMS 2503*,[73] a dispute involving a complaint from one owner that the actions of the strata corporation in permitting another owner to use the common property were significantly unfair. In its reasons for decision, the BCSC described "significantly unfair" as encompassing an action that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, has been done in bad faith, and/or has been unjust and inequitable."[74] Similarly, in *Gentis* the BCSC denied a remedy on the grounds that a strata corporation was entitled use its discretion to make decisions that affected owners, and that courts should "only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness."[75] The British Columbia Court of Appeal (BCCA), in upholding the decision of the trial court in *Reid*,[76] cited *Gentis* with approval: "the common usage of the word 'significant' indicates that a court should not interfere with the actions of a strata council unless the actions

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[72] See *ibid*, s 164. A complaint under s 164 would now proceed to the Civil Resolution Tribunal, not the BCSC. See the *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 3.6.

[73] 2001 BCSC 1578, [2001] BCJ No 2377 [*Reid*].

[74] *Ibid* at para 13.

[75] *Supra* note 63 at para 28.

[76] *Reid*, *supra* note 73.

result in something more than mere prejudice or trifling unfairness."[77] In short, unfairness must be substantial, not trivial.

This threshold for unfairness suggests that the question of who bears the burden of establishing "significant unfairness" will be crucial to the outcomes of individual cases. The standard is far from precise, but it is clear the courts will expect evidence demonstrating more than mere or inconsequential unfairness.

The courts could use the 80 percent threshold to allocate the burden of establishing significant unfairness. If so, then the burden would fall to those who opposed dissolution where the threshold had been met, and to those in support where it had not. However, the supermajority threshold seems a less obvious tipping point for the burden of proof when the issue is "significant unfairness" than when it is "best interests". In fact, the courts might reasonably start with a presumption that the involuntary loss of property, which is part of nonconsensual dissolution, creates significant unfairness to those nonconsenting owners. Under this approach, those pushing for dissolution should expect to present evidence that it would be significantly unfair not to proceed with dissolution. Indeed, some weighing of respective unfairness seems inevitable regardless of whether the 80 percent threshold has been met. It also seems clear that the weight or degree of the burden will depend on the extent of support for dissolution, but that burden will not flip entirely from those in support of dissolution to those opposed at the 80 percent threshold. At a minimum, the burden of demonstrating significant unfairness will be shared.

The courts have also grappled with the question of whether they should limit themselves to a review of processes and procedures, or whether they should also consider the fairness of substantive outcomes. In *Peace v The Owners, Strata Plan VIS 2165*,[78] a dispute involving the allocation of renovation expenses, the BCSC ruled that "the focus of [section 164] is on the conduct of the Strata Corporation and not on the consequences of the conduct",[79] and that "if the decision is made in good faith and on reasonable

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[77] *Reid v Strata Plan LMS 2503*, 2003 BCCA 126 at para 27, [2003] BCJ No 417.

[78] 2009 BCSC 1791, [2009] BCJ No 2609 [*Peace*].

[79] *Ibid* at para 55.

grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others."[80] However, the BCCA rejected this approach in *Dollan v The Owners, Strata Plan BCS 1589*[81] when it granted a remedy to the plaintiff who alleged significant unfairness over the decision of a strata corporation not to replace a window: "The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose."[82]

Turning back to the nonconsensual dissolution of strata property, the courts might, following the reasoning in *Peace*, limit their scrutiny of unfairness to the processes and procedures of the strata corporation in the dissolution vote. If so, the courts would ask whether the strata corporation had acted reasonably and fairly in conducting the vote, and would scrutinize the process for evidence of coercion, intimidation, deception, or conflicts of interest.[83] However, they would not scrutinize the outcomes for unfairness. The justification for this approach rests on an argument that British Columbia, in reducing the threshold for strata property dissolution from unanimous consent to supermajority approval, has established the threshold to dissolve strata property. Once that threshold is met, then the owners seeking dissolution should be permitted to proceed. The role of the courts is to review the fairness of the decision-making processes, not the substantive outcomes.

The role of the courts in reviewing the legitimacy and fairness of the process in strata property dissolution is undeniably important. Moreover, under accepted principles of statutory interpretation, the courts should require strata corporations to comply strictly with the statutory requirements because the nonconsensual dissolution of strata property

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80 *Ibid.*

81 2012 BCCA 44, 346 DLR (4th) 630.

82 *Ibid* at para 24.

83 See Sood, *supra* note 54 at 81–89, reviewing the jurisprudence from Singapore on the nature of good faith and arm's length collective sales.

involves the taking of property from dissenting owners.[84] Indeed, in rejecting the argument in the Bel-Aire Villa litigation that the rule of strict construction should not apply to the statutory provisions authorizing the nonconsensual dissolution of strata property, Justice Milman wrote:

> While I agree that the application of the rule calling for a strict construction of expropriation statutes must be sensitive to the context, and in this case one must account for the shared ownership regime and the strong majority support for the winding-up resolution demonstrated by the vote, that context does not change the fact that this is still an involuntary taking of a home. It must, at a minimum, be done according to law.[85]

This is an important statement connecting nonconsensual dissolution to the taking of property and then with the common law principle that the statutes which authorize a taking of property should be interpreted strictly. The rule of strict construction follows from the recognition of non-consensual dissolution as a taking.[86]

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[84] See Eric CE Todd, *The Law of Expropriation and Compensation in Canada, 2nd Ed.* (Scarborough, ON: Carswell, 1992), 29–31; Pierre-André Côté, *Interpretation of Legislation in Canada* (Toronto: Carswell, 2011), 511; Ruth Sullivan, *Sullivan on the Construction of Statutes, 6th Ed.* (Markham, ON: LexisNexis, 2014), 500–04. See also the dissenting opinion of Justice L'Hereux-Dubé in *Leiriao v Val-Bélair (Town)*, [1991] 3 SCR 349, at 357: "Because property is a fundamental legal right, and because expropriation is such an exorbitant power, Canadian law has consistently favoured a restrictive interpretation of statutes enabling expropriation." One of the clearest statements of the underlying principle animating the rule that statutes authorizing the taking of property must be strictly construed appears in the decision of Chief Justice Fitzpatrick in *Riopelle v The City of Montreal*, (1911) 44 SCR 579, at 582–83:

> When the law invests a person with authority to do an act which, if done without express legal sanction, would be an offence, the conditions subject to which the act is authorized must be complied with literally. In other words, where the legislature has thought fit to direct the doing of something which but for that direction or authority would be an actionable wrong it is incumbent on the party who professes to exercise the power conferred by the statute to prove beyond all doubt that he strictly complied with the conditions subject to which the power has been conferred.

[85] *Supra* note 18 at para 41.

[86] If non-consensual dissolution is not understood as a taking, then it becomes simpler to conclude that courts should overlook technical breaches in order to give effect to the legislative objective of facilitating collective sales. See Sood, *supra* note 54 at 80 on the

However, the importance of process and of strict compliance with the statutory requirements for the dissolution of strata property should not preclude judicial analysis of substantive outcomes. The courts have rejected limiting themselves to an analysis of process when reviewing the actions of strata corporations for unfairness in other contexts, and they should reject it when considering the contested dissolution of strata property. A scrupulously fair and transparent process which complies with the *Strata Property Act* and that leads to a supermajority vote in favour of dissolution should not immunize the result from review. The courts should also inquire into the probability and extent of significant unfairness in the outcome, particularly because they are being asked to sanction the attempt by a majority of owners to dispossess a minority of their interests in land. If anything, the moment at which an individual is threatened with the involuntary loss of property demands not only heightened judicial scrutiny of process, but also of outcomes.

Moreover, it is not just the involuntary loss of property that is at stake in strata property dissolution cases, but also the nature of ownership itself. Courts are determining the circumstances in which strata property may be taken without consent, and thus the conditions in which property interests in land are protected only by the right to compensation for their loss. As a result, when deliberating about whether to confirm this private-to-private taking, courts should consider the possibility of significant unfairness in outcomes, not just processes.

To extend the analysis to outcomes as well as process does not mean that courts should never confirm a supermajority resolution to dissolve strata property, or that they should never grant a dissolution order in circumstances where the supermajority threshold has not been achieved. The courts should ask whether it is significantly unfair that a majority of owners dispossess a minority, but they may also need to ask whether it would cause significant unfairness for a minority to force uneconomical

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approach of courts in Singapore: "Having regard to the policy objective of the collective sale scheme to facilitate *en bloc* sales, the courts will not allow what is a truly technical breach of the LTSA which causes no prejudice to the minority unit owners to frustrate the wishes of the majority unit owners who wish to obtain a collective sale order."

renovations on the majority, or for a majority of owners to be deprived a developer's premium by a minority that refuses to sell. The possibility of an outcome that creates significant unfairness does not apply only to those who might be dispossessed involuntarily.

However, the degrees of potential unfairness are not equivalent in these scenarios. The first—the involuntary termination of ownership, and commonly the loss of home—presents a different order of potential unfairness than that which prevents owners from maximizing the exchange value of their property interests. This claim that the loss of property, particularly residential property, deserves heightened scrutiny from the courts rests on a judgment that property in land may have value that cannot be captured only in its exchange value. The metaphor of house or home as castle has strong purchase in the common law,[87] and the fact that this imagery has transcended the legal realm reflects broad cultural recognition of the particular importance of home. The home as castle was never impenetrable, and the courts have indicated a particular need to re-think the maxim in the context of strata property homes.[88] Nonetheless, "home" still evinces a resonant claim to permanence, or at least supports an expectation that owners must consent to the transfer of property that is home. Justice Milman invoked this expectation in his Bel-Aire Villa decision when he used "home", instead of "strata lot" or "fee simple" or some other more legally precise and less emotive term, to describe the property that the majority of owners were proposing to take from the dissenting minority.[89] Of course, an owner's consent to the transfer of an interest in

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87 See D Benjamin Barros, "Home as a Legal Concept" (2005-2006) 46 Santa Clara L Rev 255, for a general discussion of the legal salience of "home"; Anneke Smit, "Making up for the Loss of 'Home': Compensation in Residential Property Expropriation" in Anneke Smit & Marcia Valiante, eds, *Public Interest, Private Property: Law and Planning Policy in Canada* (Vancouver: UBC Press, 2016) 280, for an analysis of "home" in Canadian expropriation law.

88 See *The Owners Strata Plan LMS 2768 v Jordison*, 2013 BCCA 484 at para 25, 52 BCLR (5th) 245; the discussion in Douglas C Harris, "Anti-Social Behaviour, Expulsion from Condominium, and the Reconstruction of Ownership" (2016) 54:1 Osgoode Hall LJ 53 at 68, 75.

89 *Supra* note 18 at para 41.

land is not always required. Expropriation legislation permits the compulsory acquisition of property in land,[90] but most commonly the taking of private interests in land is done by a public entity for a public purpose.[91] In the nonconsensual dissolution of strata property, owners are taking property from other owners.

Moreover, until British Columbia amended its strata property legislation in 2015, strata property owners acquired their strata lots under a legislative framework that established a presumption that the dissolution of strata property required unanimous consent. When the province changed the dissolution threshold to supermajority approval, it upended existing expectations that the termination of a strata property interest required an owner's consent. In fact, the province introduced a fundamental change to the nature of strata property when it displaced the need for consent with a right to compensation as the principal protection for individual strata lots. In the immediate aftermath of this legislative change, when the newly reduced dissolution threshold is likely to produce a spike in attempts to dissolve strata property, courts should be attuned to claims of significant unfairness by those who face involuntary loss of property. In particular, the courts must reject the argument that strata property owners somehow consented to the possibility that they could be dispossessed by other owners on the strength of a supermajority vote. The claim that nonconsensual dissolution is part of the strata property package may become more persuasive over time, but hundreds of thousands of existing strata property owners in British Columbia acquired their interests on the basis of a reasonable expectation that dissolution required their consent. This should bear on the judicial interpretation of "significant unfairness".

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90 See *Expropriation Act*, RSBC 1996, c 125.

91 There is no constitutional requirement in Canada, and no statutory requirement in British Columbia, that expropriation must be for a public purpose or even in the public interest. See Eran Kaplinsky & David R Percy, "The Impairment of Subsurface Resource Rights by Government as a 'Taking' of Property: A Canadian Perspective" in B Hoops et al, eds, *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven International Publishing, 2015) 223, for a recent discussion of Canadian takings law.

C. SIGNIFICANT CONFUSION AND UNCERTAINTY

Finally, the *Strata Property Act* directs the courts to consider "the probability and extent, if the winding-up resolution is confirmed or not confirmed, of... significant confusion and uncertainty in the affairs of the strata corporation or of the owners."[92] Unlike the directives regarding "best interests" and "significant unfairness", which focus on owners, this provision requires the courts to consider the impact on the strata corporation. As an independent entity, the strata corporation represents the collective interests of the owners. This may suggest that the questions of confusion or uncertainty are primarily a collective concern, although where there is an order to dissolve strata property, the structure for collective decision making—the strata corporation—disappears and any concern for confusion or uncertainty must then focus on the owners.

There is not an equivalent to "significant confusion or uncertainty" elsewhere in the *Strata Property Act*, and thus no related body of case law on which to draw. The judicial interpretation of "significantly" in relation to "significantly unfair" seems applicable to "significant" as it modifies confusion or uncertainty; trifling confusion or uncertainty should not concern the courts. Beyond that, there is little guidance in the existing case law. In *Buchanan*, the one case under the prior regime to consider a court-ordered dissolution, the Court declined to grant the order even though it acknowledged that requiring the owners to continue together was almost certain to produce a great deal more confusion and uncertainty than dissolving the strata property.[93] Perhaps most importantly, the direction to consider confusion or uncertainty requires a court to address the consequences of its decision, not just the process.

PART V: OWNING AND DISSOLVING STRATA PROPERTY IN THE CITY

The decision to dissolve strata property, and thus to cancel a strata plan, to convert the owners of separate fee simple interests into tenants-in-common

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92 *Supra* note 8, s 278.1(5)(b). (See also *ibid*, s 284(3)(b).)

93 See *supra* note 45 at para 38.

of all the property formerly within strata property, and to wind-up the strata corporation, is perhaps the single most important decision in the lifecycle of a strata property development.[94] It is a crucial moment for individual owners as they contemplate the termination of fee simple interests and, for many, the selling of homes. Moreover, in cities such as Vancouver, which are grappling with rapidly escalating land prices, development pressures, and an aging stock of strata property developments, this moment of decision will become increasingly common. When built, Twelve Oaks was at the leading edge of strata property development in Vancouver; a little more than 40 years later, its demise is a harbinger of many strata property dissolutions to come.

The 2015 amendments to British Columbia's *Strata Property Act* require the courts to be involved in almost all strata property dissolutions, either to confirm the resolution of a strata corporation to dissolve with the support of at least 80 percent of the owners, or to order dissolution based on a petition from one or more owners. How the courts interpret their role when confronted with contested applications to dissolve strata property will be crucial to the outcomes of individual cases, but also to the character of strata property and its social purposes. Moreover, the understanding of what it means to be an owner of an interest in land, including land outside strata property, will be shaped increasingly by the rapidly proliferating architecture of ownership. Here I gather together several predictions and prescriptions from the preceding section. The predictions are founded on an interpretation of the statutory provisions and the small body of existing case law; the prescriptions are based on recognition of the constitutive power of the courts to shape the nature of ownership and its social functions when ruling in contested strata property dissolution cases. For the most part, the predictions and prescriptions align.

First, the 2015 amendments establish a presumption in British Columbia that 80 percent of owners may precipitate the dissolution and collective sale of strata property. This presumption will strengthen as support for dissolution approaches unanimity. However, the supermajority

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[94] Hazel Easthope et al, "How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-Title Developments" (2014) 32:3 Urban Policy & Research 289.

vote only establishes a presumption. The statutory direction that courts consider "best interests", "significant unfairness", and "significant confusion or uncertainty" creates space for those who are opposed to dissolution to rebut the presumption in favour of dissolution. Similarly, the legislation enables those seeking dissolution to rebut a presumption against dissolution where the supermajority threshold has not been achieved. The weight of the burden will shift with the degree of support for dissolution, but it will never lie entirely with one side or the other. The courts will expect arguments and evidence from both sides of contested strata property dissolutions in relation to best interests, significant unfairness, and confusion or uncertainty. Moreover, the burden to rebut the presumption in favour of dissolution should not be thought to be insurmountable, particularly when the vote is at, or just above, the 80 percent threshold. As the proportion of those opposed to dissolution approaches 20 percent, the courts will have to grapple with the fact that to confirm a dissolution vote is to condone the involuntary taking of property from a substantial, dissenting minority.

Second, fair processes and procedures leading to a dissolution vote are essential, and a strata corporation must expect to defend the legitimacy and integrity of a vote in favour of dissolution in order to demonstrate that the process has not created "significant unfairness". The BCSC has indicated already that because the *Strata Property Act* authorizes the taking of property, the statutory requirements will be construed strictly.[95] But even strict compliance with the *Act* and scrupulous attention to process will not immunize a dissolution vote from broader considerations of unfairness. The courts will also consider whether nonconsensual dissolution causes significant unfairness in its outcomes. In most cases, the analysis of outcomes will focus on the dissenting minority who are threatened with the involuntary loss of property. However, the courts may also consider whether a decision not to confirm dissolution causes significant unfairness to those who support it. Nonetheless, the courts will be particularly attentive to the potential unfairness for those who oppose dissolution. A decision to confirm nonconsensual dissolution, and thus to condone the

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[95] *Supra* note 18 at para 41.

private-to-private taking of property, requires greater sensitivity to unfairness than a decision to refuse dissolution, and thus to prevent owners from maximizing the value of property interests.

Third, the courts should be particularly sensitive to the possibility of significant unfairness in the wave of nonconsensual dissolution votes that are likely to follow the implementation of the supermajority threshold in 2016. Until British Columbia amended the *Strata Property Act* in 2015, strata property owners acquired their interests with a reasonable expectation that the dissolution of strata property required their consent. The shift to a presumption that supermajority approval is sufficient is also a shift, as I have argued here, in the nature of ownership. For many owners, particularly homeowners, it may be a destabilizing shift that undermines existing expectations of permanency, or at least of the right to insist on consent to the transfer of a property interest. Concerns about the unfairness caused by this shift to nonconsensual dissolution will dissipate over time as it becomes reasonable to expect that strata property owners have consented to the possibility that a supermajority of owners may precipitate the dissolution of strata property. In the meantime, this regime change, and its impact on ownership, should be part of any analysis of unfairness.

Finally, the social and urban context of the attempts to precipitate nonconsensual dissolution matters. When evaluating best interests and significant unfairness, the courts should pay attention to this broader context in which they are deciding whether to confirm the involuntary loss of property or to sustain an association of owners within strata property. It is only with attention to this context that the courts will be able to evaluate best interests and determine whether proceeding or not proceeding with the nonconsensual dissolution of strata property creates significant unfairness in the outcome.

This final point about the importance of the social and urban context may be more prescription than prediction, although context played an important role in the judicial consideration of two contested attempts to dissolve common law condominium developments.[96] In each case, a group

[96] See *Mowat*, *supra* note 17; *McRae*, *supra* note 17; the discussion in Harris & Gilewicz, *supra* note 17.

of owners sought an order from the courts under the *Partition of Property Act*[97] to partition and sell co-owned property in order to take advantage of a developer's offer that was substantially above the cumulative assessed value of the individual lots. The dissolution provisions in the *Strata Property Act* were not at issue, but the lines of conflict between the owners were the same. Those who sought dissolution were seeking to maximize the exchange value of their interests through collective sale; those who opposed it sought to remain owners within the common law condominium and to retain their homes. In *Mowat*, the BCSC denied a substantial minority its petition for partition and sale;[98] in *McRae*, the court granted the order on a similar petition from 92 percent of owners.[99] In both, the courts heard extensive evidence from the opposing parties,[100] and in *Mowat* the Court indicated that the evidence it heard from those opposing dissolution about the local housing market, and the difficulty of re-entering it if they were forced out, was a crucial element in the decision.[101] In brief, the social and urban context mattered.

It should matter. A strata property dissolution regime, constructed through legislation and case law, is the outcome of choices—whether consciously made or not—about the nature of property and its social

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97 RSBC 1996, c 347.

98 See *supra* note 17 at paras 191–92.

99 See *supra* note 17 at paras 41, 57.

100 Summarized in *Mowat*, *supra* note 17 at paras 19–26, 61–94; *McRae*, *supra* note 17 at paras 21–39.

101 See *Mowat*, *supra* note 17 at paras 162, 167:

> I am satisfied that the evidence presented by the respondents establishes that a substantial number of residents at Cypress Gardens would be unable to purchase comparable replacement homes on the North Shore for the amount of money they would likely realize from a court-ordered sale. Moreover, many of the respondents would not be able to finance the additional cost of purchasing replacement accommodation, with the result that they would lose their homes and be forced either to rent or to move to a different municipality, far from their work, their friends, and their children's schools.

(*ibid* at para 167).

purposes.[102] A regime that facilitates nonconsensual dissolution, and thus the private-to-private takings of interests in land, protects property through a right to compensation if it is taken, not a right to consent to its transfer. Such a regime better enables owners to maximize the exchange value of their property, but it does so at the cost of the right to remain secure as an owner. The result is to construct property in land more as commodity for investment than, in the case of residential property, as home.

The choice to enhance value over the capacity to remain an owner affects individual owners, but it also shapes the social and physical fabric of the city. Indeed, Troy et al suggest "the struggle between exchange value and use value . . . for strata owners facing renewal may well become one of the defining issues for the next few decades of urban change",[103] and at least in a city such as Vancouver where, according to the 2016 census data, strata property provides the legal architecture of ownership for one third of households,[104] I think they are right. The rules governing the dissolution of strata property will shape the city.

The courts will be contributing to these rules, and thus to the shaping of property and the urban landscape, when they decide contested strata property dissolution cases. At a minimum, they need to recognize the constitutive power of their decisions in constructing the institution of

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[102] See Cathy Sherry, "Termination of Strata Schemes in New South Wales—Proposals for Reform" (2006) 13:1 Austl Prop LJ 227 (insisting on paying attention to the social consequences of a change that facilitates dissolution of strata property).

[103] Troy et al, "Strata Termination", *supra* note 32 at 14.

[104] Statistics Canada, *Vancouver, CY [Census subdivision], British Columbia and British Columbia [Province]*, Table, *Census Profile, 2016 Census*, Catalogue no 98-316 -X2016001 (Ottawa: Statistics Canada, 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> (accessed 26 October 2017). The figure is slightly lower—30.5 percent—for the *Vancouver [Census metropolitan area]*: Statistics Canada, *Vancouver: [Census metropolitan area]*, Table, *Census Profile, 2016 Census*, Catalogue no 98-316-X2016001 (Ottawa: Statistics Canada, 2017), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/index.cfm?Lang=E> (accessed 26 October 2017). Both figures include households that own and that rent within condominium, and are well above the national average of 13.3 percent. See Statistics Canada, "Housing in Canada: Key Results From 2016 Census" (25 October 2017), online: <www.statcan.gc.ca/daily-quotidien/171025/dq171025c-eng.htm>.

property. More than that, in Vancouver amd other cities, where "gentrification"—"the production of urban space for progressively more affluent users"[105]—seems too genteel a characterization of the rampant escalation of land values in recent years, the courts should also be aware that their rulings have the capacity to exacerbate or to mitigate what is widely perceived as a crisis of affordability.[106] The fact that Vancouver's housing stock is among the least affordable of major housing markets in the western world is a function of factors beyond the rulings of judges in strata property dissolution cases, but the construction of property and its social purposes is part of this larger story. A jurisprudence that recognizes and considers this context when it grapples with contested attempts to dissolve strata property will not only be welcome, but necessary.

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[105] Jason Hackworth, "Postrecession Gentrification in New York City" (2002) 37:6 Urban Affairs Rev 815 at 815.

[106] See Centre for Public Policy Research, Simon Fraser University, *Vancouver's Housing Affordability Crisis: Causes, Consequences and Solutions*, Josh C Gordon (Vancouver: Centre for Public Policy Research, 2 May 2016).