Real Estate Development:
Resort and Hotel Properties

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REAL ESTATE DEVELOPMENT: RESORT AND HOTEL PROPERTIES

I. MARKETING RESORT AND HOTEL PROPERTIES

A. Introduction

Hotel development and financing has always been a challenging area of real estate development. It is probably the most difficult area of real estate development to get conventional financing for new projects. Conventional real estate lenders do not like the long time it takes for a new hotel to build a customer base and become profitable. Combined with cyclical tourism markets and smaller resale markets, many lenders are not keen to service this market.

Developers of hotels and resorts have therefore looked to other sources of financing. One principle source of financing in recent years is the development of strata hotels and fractional ownership structures that have achieved various degrees of success.

Such hotel and resorts take many physical forms, including conventional hotels with a typical hotel room without any kitchen facilities; to full residential condominium projects with kitchens and living rooms in addition to bedrooms; and everything in between. What sets these projects apart from typical condominium developments is that they generally provide a structure in which the room or strata lot is made available to the hotel operator by the owner, fro rental on a short term basis to hotel guests, when not occupied by the owner. Indeed most developments are structured so as to prohibit the owner from occupying the unit except for restricted periods of time and requiring that their strata lots be made available to the hotel operator for rental to guests.

The details of the structures of their developments are examined elsewhere in this course. This paper will focus on one aspect of such structures, the regularity regime under the *Real Estate Development Marketing Act ("REDMA")* and the *Real Estate Services Act ("RESA")* applicable to such projects.

This paper will not focus on the *REDMA* & *RESA* regulations that apply to traditional strata developments, that just happen to be located in resort areas. The basic *REDMA* and *RESA* requirements applicable to traditional projects are set out in detail in Chapter 12 of Continuing Legal Education's Real Estate Development Practice Manual. Instead it will focus on the regulations that particularly or in some cases uniquely, apply to those projects that have as a central part of their structure the operation as a hotel or resort, as well as those projects involving a fractional ownership structure that see a number of owners own a strata lot, with each having use of the unit for specific periods.

In addition, this paper will examine the marketing of BC projects in Alberta and the regulatory requirements under the Alberta *Real Estate Act*. It will also examine the marketing in British Columbia of projects located outside of British Columbia.

II. REAL ESTATE DEVELOPMENT MARKETING ACT REQUIREMENTS

A. *Real Estate Developments Marketing Act*

REDMA and the Real Estate Development Marketing Regulation (the "Regulation"), were brought into force on January 1, 2005 replacing Part 2 of the *Real Estate Act*. *REDMA* now governs the marketing in British Columbia of a "development property" including such specialized real estate structures as strata hotels, time shares and "quarter ownership interests." At the same time *REDMA* was brought into force, the Superintendent of Real Estate (the "Superintendent") repealed all its policy statements issued under the *Real Estate Act,* and issued 13 new policy statements (the "Policy Statements") that set out specific requirements for disclosure statements and related policies. Copies of the Policy Statements can be found on the Superintendent website (www.fic.gov.bc.ca) or in the Real Estate Development Practice Manual.

Under the *Real Estate Act,* a prospectus was required for timeshares and all projects where the property is located outside BC, but marketed in BC. Under *REDMA,* prospectuses are no longer required for any project (although a project is exempt from the requirements of *REDMA* if a prospectus for that project is filed in accordance with the *Securities Act;* see J-2) and disclosure statements are now used exclusively under *REDMA*. Disclosure statements will now be reviewed for form and content on an "audit" basis only and the Superintendent has no obligation under *REDMA* to review the materials submitted. The Superintendent's office has moved closer to the model adopted by the British Columbia Securities Commission and other regulators, that require that disclosure materials be filed with the regulator, but clearly make the signatories to the disclosure document responsible for all information set out therein. With this change in approach came a concurrent expansion of the Superintendent's investigative and enforcement rights and powers.

B. Development Property and Development Unit

Under *REDMA,* the terms "development property" and "development unit" are the key definitions used to bring projects within *REDMA*'s regulatory regime.

Section 1 defines "development property" and "development unit" as follows:

> "development property" means any of the following:
>
> (a) 5 or more subdivision lots in a subdivision, unless each lot is 64.7 ha or more in size;
>
> (b) 5 or more bare land strata lots in a bare land strata plan;
>
> (c) 5 or more strata lots in a stratified building;
>
> (d) 2 or more cooperative interests in a cooperative association;
>
> (e) 5 or more time share interests in a time share plan;
>
> (f) 2 or more shared interests in land in the same parcel or parcels of land;
>
> (g) 5 or more leasehold units in a residential leasehold complex;

"development unit" means any of the following in a development property:

(a) a subdivision lot;

(b) bare land strata lot;

(c) a strata lot;

(d) a cooperative interest;

(e) a time share interest;

(f) a shared interest in land;

(g) a leasehold unit;

These two definitions form the basis for determining whether a "developer" is subject to the regulatory requirements of *REDMA*. It is important to note, that there are separate definitions for each individual component of the "development unit" definition and those definitions should be reviewed as part of determining the requirements of *REDMA* for a hotel or resort project. Most strata hotel or resort projects will fall within the definitions of bare land strata lots (ranch properties, waterfront recreational properties) strata lots (some strata hotels time shares (quarter ownership).

C. Marketing

A developer must not market in British Columbia a development unit in a development property except in compliance with *REDMA*. Since it is the marketing activity that is being regulated, it does not matter whether the development property is located in British Columbia or not (see section J below). Section 1 defines "market" as:

(a) to sell or lease,

(b) to offer to sell or lease, and

(c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease.

The Superintendent has set out the following guidelines in its Policy Statements (No. 1, 2, 3, 8, 9, 10 and 11) of what it considers to be marketing:

> *Marketing includes engaging in any transaction or other activity that will or is likely to lead to a sale or lease. It is the superintendent's view that marketing includes the use of "letters of intent", "priority lists", "reservation agreements", "conversion rights", "rights of first refusal", or any similar agreement that carries with it the right to acquire a [development unit]. Accordingly, developers should file a disclosure statement before using any such agreement or receiving any deposit or other consideration.*

The Superintendent has also set out in its Policy Statements those activities that it considers not to be marketing, which are, accordingly, permissible even before a developer has filed a disclosure

statement and met the other requirements for marketing under *REDMA* the Superintendent has set out in its Policy Statements those "pre-marketing" activities that it considers permissible. For example, Policy Statement 1 provides that:

> *Developers may advertise a proposed development and communicate with potential purchasers so long as potential purchasers do not gain the impression that they have a right to acquire a strata lot. To avoid confusion, it is recommended that every advertisement contain the developer's name and address, the telephone number of at least one representative from whom information and a copy of the disclosure statement (when available) may be obtained, and a prominent disclaimer stating that the advertisement is not an offering for sale and that such an offering can only be made after filing a disclosure statement.*

D. Disclosure Statements

1. Filing A Disclosure Statement

Pursuant to s. 14 of *REDMA,* a developer must not market a development unit unless the developer has prepared and filed a disclosure statement with the Superintendent, and provided to the Superintendent any additional records required by the Superintendent. Any such disclosure statement must:

(1) be in the form and include the content required by the Superintendent;

(2) without "misrepresentation", plainly disclose all material facts and set out the substance of a purchaser's rescission rights; and

(3) be signed by the required parties.

Under *REDMA,* while disclosure statements are required to be filed with the Superintendent, s. 17 provides that the Superintendent is not under any duty to determine:

(1) whether the statements contained in a disclosure statement are true;

(2) whether the disclosure statement contains any misrepresentations; and

(3) whether a disclosure statement contains the information required by *REDMA* and the Regulation.

The Superintendent issues a letter acknowledging the filing after the disclosure statement has been received but the developer does not have to wait to receive the letter before the developer can begin marketing.

The Superintendent will review the form and content of the disclosure statement and may choose to audit the statement. The developer will be required to amend the disclosure statement if the Superintendent, deems it necessary after their review. Although the Superintendent will review the disclosure statement, it is the developer's responsibility to ensure that the disclosure statement contains the required information. *REDMA* provides penalties for developers who do not comply with these requirements.

2. Form and Content

Policy Statements numbers 1, 2, 3, 8, 9, 10, 11 and 13 set out in detail the form and content that must be included in a disclosure statement for that particular type of development property. There are separate Policy Statements for:

(a) Strata lots (Policy Statement 1);

(b) Bare land strata lots (Policy Statement 2);

(c) Subdivision lots (Policy Statement 3);

(d) Time share interests (Policy Statement 8);

(e) Leasehold units (Policy Statement 9);

(f) Cooperative interests (Policy Statement 10);

(g) Shared interests in lands (Policy Statement 11); and

(h) Real estate securities (Policy Statement 13).

All disclosure statements must be prepared in the Superintendent's standardized formats (including numbering and headings) as set out in the applicable Policy Statement. Any additional information that a developer or their lawyers, believe ought to disclose should generally be added to that part of the disclosure statement under the heading "Other Material Facts" unless otherwise provided in the relevant policy statement, though it is permissible to include additional relevant information under the required heading for that type of information in the disclosure statement. This uniform approach to disclosure statements was intended to streamline the process for developers, facilitate the Superintendent's review of disclosure statements, and potentially allow purchasers a better understanding of disclosure statements along with an ability to compare disclosure statements for different projects.

3. Solicitors Certificate

Section 14(3) of *REDMA* provides that a developer must provide to the Superintendent any records the Superintendent requires to support any statement contained in the disclosure statement. One typical requirement is the provision of the solicitor's certificate. While the solicitor's certificate is no longer required to form part of the disclosure statement, it must accompany the filing of the disclosure statement with the Superintendent. The scope of the solicitor's certificate in most circumstances is limited to certifying the identity of the registered owner (and, if the developer is not the registered owner, the developer's legal arrangement that enables the developer to market the development unit), the legal description of the development unit, and the existing encumbrances and legal notations that charge the development unit, all as set out in the disclosure statement. (See also section IV D below)

E. Early Filing of Disclosure Statements

1. Filing Before Obtaining Building Permit

In addition to the specific requirements set out in sections 4 to 9 of *REDMA* that apply to the different types of development units, there is a general prohibition on marketing development units unless a developer has made "adequate arrangements" to ensure:

(1) that a purchaser of the development unit will have "assurance of title" or of the other interest for which the purchaser has contracted (s. 11); and

(2) the developer has made adequate arrangements to ensure payment of the cost of utilities and other services associated with the development unit (s. 12).

With respect to "assurance of title", s. 11(2) of *REDMA* provides that a developer has made "adequate arrangements" if:

(1) title to the development unit is held in trust by a lawyer, notary public, or another person specified by the Superintendent until title or the other interest for which the purchaser has contracted is assured;

(2) the developer provides a bond to the Superintendent or other party specified by the Superintendent for the benefit and protection of the purchaser with surety in such amount as required by the Superintendent; or

(3) the developer has made other arrangements that are satisfactory to the Superintendent.

The Superintendent has set out in Policy Statement 4 the circumstances in which arrangements are "deemed to be adequate" for the purpose of transferring to a purchaser a registerable interest in title to a development unit, free and clear of all liens, charges, and encumbrances. Essentially, setting out a closing mechanism in the contract of purchase and sale, that includes the usual undertakings exchanged by lawyers to facilitate a land title office closing, satisfies Policy Statement 4. Where title to property (or another form of interest in real property) is not being transferred to a purchaser (for example, an interest in a "points" based time share program or similar time share programs), the developer will have to provide assurance of title through option (1), (2), or (3) above.

The Superintendent will accept filing of a disclosure statement before a building permit is issued where the developer has received "approval in principle" from the appropriate government authority to construct or otherwise create the development units and has obtained the Superintendent's permission. Policy Statement 5 sets out the circumstances, including the applicable terms and conditions, in which the Superintendent's permission to begin marketing is "deemed to be granted". In the case of a bare land strata lot, a building permit is not necessary for the individual cabins or homes if it is only the lot being sold.

2. Filing Before Obtaining Financing

A developer may not market a development unit before making "adequate arrangements" for the installation of utilities and services associated with the development unit. With respect to utilities and services, s. 12 of *REDMA* provides that a developer has made "adequate arrangements" if arrangements have been made for:

(1) title to the development unit to be held in trust by a lawyer, notary public, or other person specified by the Superintendent until the cost of utilities and other services associated with the development unit has been paid;

(2) the developer provides a bond to the Superintendent or other parties specified by the Superintendent for the benefit and protection of purchasers with surety in the amount required by the Superintendent; or

(3) the developer has made other arrangements that are satisfactory to the Superintendent.

Policy Statement 6 sets out the circumstances in which arrangements made for utilities and services are deemed to be adequate for the Superintendent if the developer has obtained a satisfactory financing commitment that meets the *REDMA* requirement. If they have a conditional financing commitment, (conditional upon a certain level of pre-sales) they may market the units provided the disclosure statement confirms that the estimated date for obtaining the pre-sales is 9 months or less from the date the disclosure statement was filed and the units are only marketed for 9 months, unless an amendment to the disclosure statement was filed and the purchase contract reflects these provisions. Where the development interests consist of time share interests further arrangements may be necessary to ensuring payment of the developer's portion of ongoing utility and servicing costs. If the developer has obtained a satisfactory financing commitment, the developer is deemed to have made adequate arrangements for the installation of utilities and services.

It is important to note that it is not possible to have a satisfactory financing commitment for utilities and services unless there is also a satisfactory financing commitment to acquire the development land and to construct the improvements. Therefore, a satisfactory financing commitment must include unconditional financing to acquire the development land, to construct the improvements, and to pay for the utilities and services.

F. Initial Rescission Periods and Deposits

1. Rescission Periods

Under the *Real Estate Act,* a purchaser had either three or seven days from the later of the date the purchaser, received, respectively, a disclosure statement or a prospectus, and the date a purchase agreement was entered into to rescind the agreement. *REDMA* provides for a standard seven-day rescission period for every type of development unit.

2. Deposits

Under Section 18(1) of *REDMA*, the developer must promptly place the purchasers' deposits with a real estate brokerage, lawyer or notary public who must place the deposits in a trust account in a savings institution in British Columbia. If a purchaser rescinds their purchase agreement in accordance with the *Act* and Regulation, the developer or the developer's trustee must promptly return the deposit to the purchaser. The deposit must be held in a B.C. financial institution.

Deposits received in respect of development units may only be paid out in accordance with s. 18 of *REDMA,* rather than s. 30 of *RESA*. Otherwise, all other provisions of *RESA* apply to the handling of deposits.

Section 18 of *REDMA* provides that deposits must be held in trust by the trustee (note that the concept of "stakeholder" is limited to the *RESA* and has not been introduced in *REDMA).* Deposits may only be released from trust in accordance with s. 18(2) to (4). There remains no legislative requirement to pay interest to purchasers in respect of their deposits. The payment of interest is market driven with the developer typically getting the interest in the current "developers market". Section 18(6) also provides protection to trustees holding deposits by discharging the trustee from liability if the deposit is paid out in accordance with the provisions of s. 18.

G. Exemptions for Filing Disclosure Statements

REDMA provides that the Superintendent may exempt a person, a development site, or a specific transaction from any provisions of Part 2 (Marketing and Holding Deposits) of *REDMA*. A developer may apply to the Superintendent for an individual exemption under s. 20 of *REDMA*. The application for an individual exemption takes the form of a letter to the Superintendent and should be accompanied by the appropriate fee (currently $300 to $800 depending on the size of the project).

In addition, exemptions from the requirement to file a disclosure statement are set out in the Regulation (see ss. 2 to 8). There are seven specific exemptions including:

(1) Marketing between developers;

(2) Marketing of development units used for industrial or commercial purposes;

(3) Leases of three years or less;

(4) Sale or lease under a *Securities Act* prospectus;

(5) Marketing of subdivision lots in a municipality;

(6) Continuing exemptions; and

(7) Low equity cooperative interests.

A number of hotel projects have been marketed pursuant to a *Securities Act* prospectus. As such they are subject to the *Securities Act* restrictions, not those in *REDMA* (see J (2) below). A developer who

markets a development under *REDMA* is exempt if the developer files a prospectus under s. 18(1) of the *Securities Act* and complies with all other requirements of the *Securities Act*.

H. Rental Disclosure Statements

Under s. 139 of the *Strata Property Act*, an owner developer who rents, or intends to rent, one or more residential strata lots must:

(1) file with the Superintendent, before the first residential strata lot is offered for sale to a purchaser, or conveyed to a purchaser without being offered for sale, a rental disclosure statement in the prescribed form (Form J-Rental Disclosure Statement) of the *Strata Property Act*;

(2) pay to the Superintendent a filing fee of $150, and

(3) give a copy of the statement to each prospective purchaser before the prospective purchaser enters into an agreement to purchase.

The Superintendent has traditionally received for filing a rental disclosure statement filed under the *Condominium Act* that provided that the developer intended to lease the strata lots indefinitely. However, there is case law that has raised concerns about citing an indefinite rental period (see A*bbas v Strata Plan LMS1291* (13 April 2000), Vancouver A992516 (B.C.S.C.)), that suggests a developer may prefer to set out a specific date albeit one a long time in the future. The slight difference in language between the *Condominium Act* and the *Strata Property Act* and in particular the wording in the form required under the *Condominium Act* and the Form J required under the *Strata Property Act*, suggests a specific date should be used.

For phased strata plans, a rental disclosure statement for all phases should be filed before the first sale in the first phase.

If the developer files a rental disclosure statement with the Superintendent, a copy must be attached as an exhibit to any disclosure statement filed under *REDMA*.

I. *REDMA* Requirements Specific to Resort & Hotel Development Properties

1. Strata Lots

If the project being marketed is a traditional strata lot development the disclosure statement will take the form set out in Policy Statement 1. It will substantially reflect the provisions in any other disclosure statement.

If however it is being operated as a hotel facility the disclosure statement will have additional provisions reflecting the securities aspect of the project as well as the unique details that relate to the fact that it will be a hotel project. These unique disclosure requirements are set out in Section J below.

2. Bare Land Strata Lots – Ranch or Recreational Projects

Some resort developments particularly the "ranch type" projects are structured as bare land strata lots. The bare strata lots are often clustered around an attractive geographical feature such as a lake, a crest of a hill with a view or a valley bottom. The bare land strata lot varies widely in size, from small city sized lots to lots 5 or 10 acres in size, with the common property including the roads required to access the strata lots, as well as trails, lakes, guest houses and other recreational facilities.

The bare land strata plan disclosure statement will be materially different from a strata lot disclosure statement in its content though it follows a similar format. The project must be described in the disclosure statement and a draft bare land strata plan attached that identifies all of the strata lots. The plans must show the layout of the bare land strata lots, the limited common property and the common property. The common property that is shared by all the owners must be described. All building restrictions whether set out in the by-laws, a statutory buildings scheme or municipal by-laws must be disclosed.

The disclosure statement must set out the permitted uses on all the bare land strata lots and whether or not any may be used for purposes other than residential purposes. It must also explain who is responsible for construction of any improvements on the bare land strata lots and whether a building permit is required. Like a regular disclosure statement it must disclose if it is a phased project and what common facilities are to be built in future phases. If it is a phase development, the signed Form P must be attached. If the signed Form P is not attached, a copy of the unsigned Form P may be attached along with an indication of whether or not the approving officer has indicated that he is prepared to sign Form P in due course.

3. Time Share Interests

Time share interests take several forms. The principle types are:

(a) where an owner buys a "weeks interest" in a project and takes a $1/52^{nd}$ interest in a strata lot. That interest is registered on title to the strata lot. The developer will typically hope to sell 51 interests, retaining 1 week per year where they will refurbish the unit.

(b) a similar structure to that set out above, but the owner does not take title to the unit, instead title is held by or a trustee in trust for the various owners.

(c) "quarter ownership structures" which are a variation of a traditional "one week" time share structure, which is simply a modern version of the first type of time share interest referred to above. Under these circumstances each owner will be recorded on title as to the "fractional interest (¼ to $^1/_{12}$ variations are typically seen).

In many ways they are no different from a traditional time share interest, other than the fact there are fewer owners who are entitled to occupy the units for longer periods of time. Some quarter ownership properties also have a mandatory rental pool element to the project. Thus their disclosure statement will be based on the one included in Policy Statement 8 with additional provisions from Policy Statement 13.

Disclosure Statements for time share interests must describe in detail the nature of the interest that the purchaser will be buying. Will they be obtaining an undivided fee simple interest in the title to their unit or will the title be held by a trustee for all of the owners. Will there be an owner's association on top of the strata corporation that addresses the additional issues that arise in a time share development such as avoiding disputes as between owners of fractional interest to a particular strata lot.

Many new time share projects involve a lease mechanism that sees all strata lots leased to the owner's association pursuant to a long term lease. The owners association then subleases the strata lot to the owners. The sublease entitles the owner to use the strata lot for specific periods. Typically the quarter owner becomes the registered owner of an undivided ¼ fee simple interest in the strata lot as well as a subtenant under the sublease.

The owners association will typically collect on fees from the owners to reflect the operating costs of their strata lot including such things as property taxes, strata corporation maintenance fees, telephone and other utility costs. If the owner fails to pay the cost the owners association will have the right to suspend the owners right to use the strata lot. Often the association has the power to rent the strata lot out and apply the revenue received to the owner's share of costs or to cancel the sub-lease.

Typically the titles of the strata lots are charged by covenants that provide that if the owner intends to rent out their strata lot, the owner must use the professional management company hired by the owners association. Owners wishing to rent out their strata lot must advise the management company that their strata lot is available for rental to the public. Often lengthy notice periods must be provided to the management company (3 to 4 months before the start of any particular season) if they wish to have personal use of the strata lot.

The complicated structure involving different owners of each strata lot, a strata corporation, an owners association and a hotel manager, means the disclosure statement must specifically address the allocation of cost between the strata corporation, the owners association, the owner and the manager. The allocation of cost varies from development to development.

Any restrictions on the use of the unit by the purchaser must be set out in the disclosure statement. As does the method in which it specific weeks are allocated to the owner and any restriction on resale must be disclosed.

Agreements with the rental management and hotel manager must be attached as schedules as already been described in the disclosure statement.

4. Shared Interests in Land in British Columbia

Section 1 of *REDMA* provides that "shared interest in land" means a person's interest in one or more parcels of land if:

(a) the parcel or parcels are owned or leased, directly or indirectly, by the person and at least one other person, and

(b) as part of any arrangement relating to the acquisition of the person's interest, that person's right of use or occupation of the land is limited to a part of the land.

Timeshare interests are not shared interests in land as they do not meet the second part of that test.

5. Shared Interest in Land Outside British Columbia

Section 9 of *REDMA* provides that a developer must not market a shared interest in land that is located outside British Columbia unless the shared interest in land can be lawfully used or occupied by a purchaser, or the appropriate municipal or other government authority has issued a building permit or given development approval, as the case may be. When acting for a developer marketing a project in B.C., you must carefully consider whether the legal structure in the jurisdiction where the property is located, makes the units shared interest in land as opposed to strata lots or time shares.

J. Real Estate Securities

1. Real Estate Securities

In many cases, the marketing of real estate development units particularly those for hotels and resorts constitute the offering of investment contracts and consequently, securities as defined in section 1(1) of the *Securities Act*. Generally, real estate development units will be considered as securities where they are comprised of a direct interest in real estate, typically a strata lot, together with an ancillary agreement, usually with the developer, for project management combined with rental pools or cash flow guarantees or other financial commitments; or revenue or expense pooling or both. In each case the purchaser relies significantly on the skill or expertise of another person to realize an economic return from the investment.

Any offering of real estate securities by a developer must be in compliance with the *REDMA* and the *Securities Act*. Information on the marketing of the real estate securities is contained in Policy Statement 13 and the BC Securities Commission's BCN 45-702, Exemptive Relief for Certain Real Estate Securities (Appendix 3).

2. Exemption from *REDMA*

If a developer of real estate securities has filed a prospectus under section 61(1) of the *Securities Act* and complies with the requirements of the *Securities Act* relevant to the marketing of the development unit, the developer is exempt from Part 2 of the *REDMA*. In this case, the developer is not required to file a disclosure statement with the Superintendent under *REDMA*. Multilateral Instrument 45-103 (now replaced by National Instrument 45-106).

3. Multilateral Instrument 45-103

Policy Statement 13 provides that if a developer of real estate securities is relying on the offering memorandum exemption under the *Securities Act* and Part 4 of Multilateral Instrument 45-103 (see the BC Securities Commission web page for a copy of National Instrument 45-106 which has replaced the Multilateral Instrument 45-103), the form of offering memorandum required under that Instrument is the disclosure statement required under the *REDMA* as it includes the information set out in BC Form 45-906F (Appendix 4) issued by the Securities Commission.

The securities information set out in BC Form 45-906F (Appendix 4) should be inserted as Part 4 of the disclosure statement, entitled Real Estate Securities Aspect of the Offering, with subsequent parts renumbered accordingly. In this case, the offering memorandum, in the form of a disclosure statement required under the *REDMA*, must be filed with the Securities Commission and the Superintendent.

4. BC Instrument 45-512

If a developer of real estate securities complies with the terms of the BC Instrument 45-512 (Appendix 2) issued by the Securities Commission, the developer is exempt from the registration and filing requirements under sections 34(1)(a) and 61 of the *Securities Act*. In accordance with section 3(a) of Instrument 45-512, the developer must file with the Superintendent the disclosure statement required under the *REDMA* that includes the information set out in BC Form 45-906F (Appendix 2), excluding items 8, 9(5) and 18. The securities information should be inserted as a Part 4 of the disclosure statement, entitled Real Estate Securities Aspect of the Offering, with subsequent parts renumbered accordingly. There is no requirement under BC Instrument 45-512 (Appendix 2) to file the disclosure statement with the Securities Commission.

5. Other Circumstances

If a developer of real estate securities intends to market development units in circumstances other than those set out in Policy Statement 13, the developer must file a disclosure statement with the Superintendent under the *REDMA* that discloses all material facts in relation to the real estate aspects of the offering. In the context of real estate securities, material facts in relation to the real estate aspects of the offering will generally include the information described items 3, 4, 5, 7, 8, 9, 11, 13 and 17 of BC Form 45-906F (Appendix 4).

The developer may disclose the information described in those items by incorporating the information into existing sections or subsections of its disclosure statement, or by adding a new Part or sections or subsections, as required to fulfil the developer's obligation to disclose plainly all material facts. If the developer chooses to include information on financial forecasts or projections in its disclosure statement, that information must be prepared in the manner described in item 15 of BC Form 45-906F. (See a sample disclosure Statement attached as Appendix 1)

Part 3 of BCN 45-702 (Appendix 3) contains information generally applicable to the marketing of real estate securities.

6. Disclosure Statement Requirements for a Hotel Facility

Any disclosure statement for a hotel project made pursuant to Policy Statement 13, whether it relates to a sale of the sale of the entire interest in a strata lot, a bare land strata project or a time share project, will require a disclaimer on the cover of the disclosure statement.

The cover of the disclosure statement must state that no securities commission or similar regulatory authority has passed on the merits of the securities offered nor has it reviewed the disclosure statement and any representation contraries or offense. The disclaimer will then refer to the

appropriate section in the disclosure statement for the real estate securities aspects of the offering. The Securities Commission requires that the statement be included in any real estate offering which includes a mandatory rental management or rental pool arrangement. The statement provides that there is no assurance that there will be a market for the resale of these real estate securities. The strata lots purchased pursuant to the disclosure statement will be subject to a resale restriction restricting purchasers that are "developers" or their agents from selling other than in compliance with the prospectus and registration requirements of the British Columbia *Securities Act* and restricting other purchasers or their agents from advertising the expected benefits of the rental management agreement (or rental pool arrangement) to a prospective purchaser.

Whether the hotel or resort project provides for the outright lot sale of a strata lot to a single purchaser, a traditional timeshare, a quarter ownership structure, there will be a common element to the disclosure statement. Other than the information traditionally found in a disclosure statement, the disclosure statement will have to address all of the unique agreements put in place to facilitate the operation of the hotel or resort. This will typically require disclosure of the following information:

(a) The disclosure of any unique strata lots for the use of the hotel operator or manager. This will often include commercial strata lots leased out for retail operations, strata lots for the public areas of the hotel such as restaurants, ballrooms, meeting rooms, spas, recreational facilities and often a strata lot for the hotel front desk, etc.

(b) As on most disclosure statements strata plans will also be attached to the disclosure statement, but for hotels or resorts they will have to identify the unique hotel lots.

(c) The disclosure statement will have to address the unique voting rights given the mixed use nature of the development. Where title to a strata lots shared amongst owners, how the voting rights applicable to the strata lot are to be exercised has to be determined.

(d) Common Property – a hotel or resort operation will have unique common property areas. These can include things such as pools, recreational facilities, trails, private utilities, etc. These can be far more wide ranging than is typical in a normal strata development.

(e) Limited Common Property – the typical hotel project will see a number of areas designated as limited common property for the benefit of the hotel manager strata lot. These will include corridors, stairways, foyers, main entrance and lobby, hotel front desk, other areas relating to the management operation of the hotel such as offices, accounting rooms, kitchen, freight elevators, storage areas for hotel guests (such as ski storage areas). The disclosure statement should address the allocation of costs with respect to such limited common property.

(f) Bylaws – a hotel or resort facility will have a unique set of strata bylaws. Such projects should not simply use the standard bylaws. Typically the project will also have separate sections for the commercial hotel and hotel management lots as well as the hotel lots.

(g) Parking – typically in a hotel development the parking spaces will be allocated or controlled by the hotel manager under a variety of mechanisms. They may be designated as limited common property for the benefit of the hotel management lot or they may use easements or leases to allocate those parking stalls to the hotel manager. There will then be a cost and revenue sharing arrangement that provides what percentage of the parking revenue from the hotel guests and visitors are allocated to the hotel operator and what percentage is allocated to the owners of the hotel strata lot.

(h) Furnishing and equipment – typically in a hotel structure the standard furnishings will be provided with each suite. This is also typically done with quarter ownership and other similar structures. The hotel operator typically budgets for the replacement of these "finishing, fixtures and equipment" for their operation of the hotel. Those items should be disclosed in the disclosure statement.

(i) Budget – the budget for any resort or hotel property combines the elements of a traditional strata development as well as other unique cost items. Often these budgets will include cost items not traditionally found in other projects such as marketing expenses. They should be developed by an experienced strata manger and hotel operator.

(j) Strata Management Contracts – there will often be two managers of the property. Often there will be a strata management company that handles the strata management aspects of the project, working with the hotel manager with respect to the hotel operations. The strata management contract will follow the provisions in the *Strata Property Act* in the terms of the length of the contract and its ability to be terminated based on a ¾ vote. The hotel management contract will be for a longer period and will traditionally be very difficult to cancel.

(k) Insurance – the insurance provisions will be different from the traditional disclosure statement in that there will typically be additional insurance. In addition to covering the building additional insurance will have to also cover the furnishings, fixtures and equipment within the hotel strata lots and cover other typical insurance risks found in hotels. The cost allocation of the insurance among the various owners must be discussed.

(l) Rental Disclosure Statement – obviously a rental disclosure statement needs to be filed and attached to the disclosure statement to reflect the fact that the strata lots are to be rented out.

(m) Title Issues – often there will be unique covenants or charges on title in favour of local government. Many resort areas want to ensure that the hotel is operated as a hotel and not as residential units. They will often require a Section 219 covenant be registered that addresses these issues.

In addition the developer and the hotel operator will often want a number of charges to be registered on title. These could include an easement in favour of the hotel management lot allowing access to the strata lots to carry out the functions

associated with the management and operation of the hotel. Similarly, there will be restrictive covenants charging the common property prohibiting the use of the common property by anyone other than the manager for a front desk, check-in services, reservation services or any other services that would compete with the hotel operation. This ensures that the hotel manager is the only person running the hotel from the project.

(n) The rental pool management agreement, rental pool covenants and the hotel management agreement should be attached to the disclosure statement.

(o) Real Estate Securities Aspects of the Offering – this is the particularly unique feature of the hotel disclosure statements and will set out in detail the securities aspect of the development. The provisions to be included are mandated by Policy Statement 13 and the BC Security Commission publications. It will have to describe the nature of the rental pool, whether it is mandatory or not, the terms of the rental management agreements and the rental pool covenants which will be attached as exhibits. The rental pool management agreement will typically be a closing document on the purchase and there will thus be a direct covenant between each purchaser and the hotel manager. The rental management must be described in detail and explain the risk and nature of those agreements.

The disclosure statement will have to make reference to the disclosure requirements under the *Securities Act*. The disclosure statement will have to disclose the exemption pursuant to which the offering is made. It will have to advise purchasers of the resale restrictions such as the provision that provides that if a purchaser is selling 5 or more lots for resale they will have to comply with the Securities requirements.

(p) The disclosure statement must advise of the various unique risk factors that apply to a hotel investment and must also address the conflicts of interest and tax considerations.

(q) All other material contracts must be disclosed

III. MARKETING B.C. RESORTS IN ALBERTA

Many B.C. resort projects target buyers in Alberta. Resorts in the Rockies are much closer to the key markets of Calgary and Edmonton and developers are building units aimed for these markets. These units are attractive to purchasers who want to own resort property but are not able or willing to purchase a conventional condominium unit and see it sit empty all of the time. They find the fact that someone will manage both the project and their strata lot appealing. The hotel structure allows a source of revenue to be tapped into, that will cover some of the owner's costs of owning and investing in the unit.

A. *Real Estate Act* (Alberta)

The *Real Estate Act* (Alberta) provides that where a property located outside of Alberta is being marketed in Alberta, a prospectus must be filed with the Real Estate Council prior to it being

marketed in Alberta. This is in contrast to projects located in Alberta that do not require a prospectus or a disclosure statement.

Under the *Real Estate Act* (Alberta) and the Rules established by the Real Estate Council of Alberta (RECA), a person who wishes to trade in real estate located in BC in Alberta, must file a prospectus with the RECA. The definition of a trade includes advertising in provincial publications, telephone solicitation and personal solicitation in the province. Where the trade consists only of an advertisement placed or made from outside Alberta, a prospectus is not required.

B. Prospectus

A prospectus has to be filed before a person (offeror) trades in real estate within Alberta when that property is physically located outside of Alberta. This does not apply when the trade is an isolated transaction. A developer marketing a BC project in Alberta, generally would not fall within the isolated transaction exemption. If an individual is in doubt as to whether their project requires a prospectus, they should contact RECA before any trading takes place in Alberta. A sample prospectus is attached as Appendix 5.

All trading in real estate within Alberta must be performed by a broker, associate broker or agent of a licensed Alberta real estate brokerage. If an individual employed by the offeror wishes to participate in the marketing activities of the project, then these activities must be performed outside of the provincial borders if that person is not licensed in Alberta.

A prospectus remains in force for twelve (12) calendar months after acceptance by the RECA's Executive Director, and if trading is to continue, a renewal prospectus must be filed.

C. Prospectus Requirements

(a) Non-refundable fees:

Number of lots, condominiums or Property user's licences	Fee
50 or less	$800
more than 50	$800 for the first 50 + $200 for each Additional 50 (or fraction thereof) Maximum $2,000

(b) The first prospectus should be submitted as a draft. A letter indicating deficiencies (if any) will be provided by the RECA within 10 to 15 days. After all requirements have been made, a signed prospectus with affidavits may be filed.

(c) The prospectus shall include financial information regarding the project that may be required under section 28(1) of the *Real Estate Act* (Alberta). This information typically includes the offeror's financial statements and cash flow statements illustrating the development phase for the project.

(d) The seller, if a corporation, is required to register in Alberta as an extra-provincial company under the *Business Corporations Act* (Alberta).

(e) All funds of an Alberta purchaser must remain in Alberta until adequate provisions are made for the assurance of title or any other interest contracted.

(f) A performance bond, surety bond, or other security may be required.

(g) An off-site appraisal, by an independent accredited appraiser, of the real estate and items contained in the prospectus should be included. Selection and costs of the appraisal are the responsibility of the seller. Where the projects are not completed or fully serviced, including promised recreation facilities, the RECA may require that all funds to be held in trust in Alberta and/or a bond in a amount to complete the project.

(h) Attachments as schedules to a prospectus may include:

- certificate of solicitor licensed to practice in the jurisdiction in which real estate is located as required in the Rules;
- a price list of units offered for sale;
- copies of all contracts to be used in Alberta;
- sample purchaser's receipt of the prospectus;
- copy of any deed of restrictions, or building requirements; and
- if the items offered for sale are condominiums, or the purchaser is required to join an owners' association, then the following or similar documents should be included: bylaws, rules and regulations, incorporation documents, and budgets

(i) The following documents also should be supplied:

- copy of the certificate of Alberta incorporation;
- consent letter from the Alberta licensed real estate brokerage marketing the project;
- appraisal report;
- copies of sales and promotional literature;
- any document relevant to the filing;
- copies of other jurisdictions who have accepted your filing;
- copies of all plans and documents mentioned in the prospectus, and uncompleted projects should include complete details of proposed funding and an estimate of cost to complete

IV. MARKETING IN BC OF HOTELS AND RESORTS LOCATED OUTSIDE OF B.C.

A. REDMA

The definitions of "development unit" and each of the components that comprise the definition of a development unit do not limit those definitions to lands located inside British Columbia. Accordingly, *REDMA* governs the marketing and sale in British Columbia of a development unit in a development property located outside British Columbia, as well as the sale outside British Columbia of a development unit in a development property located within British Columbia, if any part of the offering occurs in British Columbia.

B. Legal Structure of the Developer

When developing a project on a different jurisdiction, the legal structure of the developer may be very different then those seen in B.C. and may not have a B.C. equivalent. B.C. counsel for the developer may require opinions from local counsel advising them of the nature of the legal structure. It is important for developer's solicitor to ensure that the developer's structure is correctly disclosed and consistently applied through all of its documentation.

C. Closing Mechanisms

Where the closing mechanism does not follow the typical undertaking mechanism in BC, the BC solicitor or their client will have to ensure a mechanism exists in the jurisdiction of the property that achieves the same result. This will often include the use of escrow agreements and escrow agents (typically title insurance companies). A B.C. solicitor advising a developer will have to work with local counsel to ensure the mechanism is the equivalent of the B.C. practice and will ensure that the buyers will get title.

D. Solicitor's Certificate and Local Opinions

When filing a disclosure statement in B.C. for a project located outside of B.C., the B.C. solicitor will typically have to rely on the opinion of a solicitor in the jurisdiction when the property is located with respect to title issues. The B.C. solicitor will have to work with the solicitor in the property's jurisdiction to get a supporting opinion that will allow the BC lawyer to complete the solicitor's certificate.

The solicitor will also have to obtain and rely on certificates from the jurisdiction of the developer as to its corporate status, as well as an opinion of a solicitor from that jurisdiction. They may also require an opinion from a solicitor located in the jurisdiction where the property is located as to with respect to the developer's registration in that jurisdiction.

E. Approvals and Early Marketing

The approvals necessary to allow a developer to commencing development, gets a bit more complicated when the project is located outside of B.C. and the jurisdiction has different approval processes that are not direct equivalents of the B.C. development approval process. In such situations the developer and their B.C. solicitor will need to rely on advice of the solicitor in the

property's jurisdiction to confirm the nature of the regulatory process and the stage of the approvals for the specific projects. This may require opinions from the local counsel involved and discussion with the Superintendent.

F. Deposits

If the law in the jurisdiction where the property is located requires that the deposit be held in another jurisdiction, you can seek an exemption from the requirement that deposits be held in B.C. from the Superintendent. If the Superintendent is satisfied that the purchasers deposits are not at risk because they are held by solicitors or escrow agents in other jurisdictions, the Superintendent may grant an exemption order. Alternatively the Superintendent can require a security be placed with the Superintendent to compensate any BC purchaser who suffers a loss due to a breach of the Act.

V. REAL ESTATE SERVICES ACT

A. Developer's Employees As Agents

While *REDMA* sets out the requirements that developers must comply with prior to marketing a development property, the *Real Estate Services Act ("RESA")* sets out the requirements for those people who are marketing the real estate. Of particular importance to developers in carrying out their marketing activities are the exemptions set out in the Real Estate Services Regulation that address the circumstances in which the developer's own employees may carry out marketing activities without being licensed under *RESA*.

Section 2.5(1) of the Real Estate Services Regulation provides that an individual is exempt from the requirement to be licensed under Part 2 of *RESA* in respect of trading services (the definition of which includes the usual activities associated with the marketing and sale of development properties) if all the following apply:

(1) the trading services are provided to or on behalf of one or more developers, as defined in *REDMA,* with respect to a development unit;

(2) the individual is the employee of one or more of the developers or a holding corporation of one or more of those developers referred to in paragraph (1);

(3) the individual is not providing real estate services (as defined in *RESA)* to or on behalf of any person other than one or more of the developers or a holding corporation of one or more of those developers referred to in paragraph (1) or a developer that is a subsidiary of such a holding corporation; and

(4) the employee discloses to each purchaser who he or she is employed by, that he or she is not licensed under *RESA,* and that he or she is acting on behalf of one or more of those developers referred to in paragraph (1), or a holding corporation of one or more of those developers, and not on behalf of the purchaser. The disclosure must be made "promptly", but in any case before a purchase agreement is entered into. In addition, such disclosure must be in writing and separate from the disclosure

statement or the purchase agreement. Therefore, where a developer intends to use its own employees to engage in trading services, the developer must ensure that the employees provide the purchasers with the required written disclosure. It is also important for developers and their counsel to examine carefully the developer's ownership structure and where, site-specific structures are created (for example, limited partnerships or joint ventures), to ensure that the actual employer of employees who will be carrying out the trading services is an entity that is permitted to supply employees to the developer on an exempt basis.

B. Strata Managers

Many strata hotels have been successfully managed by hotel operators for a number of years. Hotel operators have great expertise in marketing, operating and maintaining successful hotels and resorts and have the links with hotel chains and reservation systems to build traffic and a customer base for the hotel or resort. Many of these resorts, while clearly structured as strata developments, are largely operated as hotels. Individuals may own a strata lot and have the right to stay in their strata lot for a limited period of time each year, but otherwise they must put them into a rental pool and the hotel manager operates the entire facility as a hotel.

1. Licensing

As of January 1, 2006 strata managers had to be licensed under RESA. RESA required all providers of "strata management services" to be licensed as of January 1, 2006. Strata management services are defined as meaning any of the following services provided on behalf of a strata corporation:

(a) Collecting or holding strata fees, contributions, levies or other amounts levied by, or due to, strata corporation under the *Strata Property Act*;

(b) Exercising delegated powers and duties of a strata corporation or strata council, including:

(i) making payments to third parties on behalf of the strata corporation;

(ii) negotiating or entering into contracts on behalf of the strata corporation, or

(iii) supervising contractors, hired or engaged by the strata corporation

but does not include an activity excluded by regulations.

It is quite clear that the activities and services performed by operators of strata hotels would fall within this broad definition. They look after the management of the building including cleaning and maintaining the common areas; maintaining the landscaping, and handling the financial records for the strata corporation including hotel revenue and expenses and administering the rental pool. They enter into contracts on the behalf of the strata corporation and supervise the contractors hired or engaged by the strata corporation. A number of operators of strata hotels and resorts are not aware of the requirements and are not yet licensed.

2. Licensing Process

In order to get licensed as a strata manager, hotel operators have to make an application to the Real Estate Council of BC ("REC"). Both the corporate entity needs to be licensed as a "Brokerage" and at least one individual needs to be licensed as a "Managing Broker". Potentially other employees of the hotel operator will have to be licensed as representatives.

3. Grandparented

Hotel operators could take the position that if they provided Strata Management Services for three months in 2005, they are entitled to be grandparented. Grandparenting eases some of the course requirements, but still requires that the examinations required by the REC be taken.

4. Non-Grandparented Route

Assuming none of the hotel operator's employees are currently licensed as realtors or strata managers under RESA, they would have to follow the following procedure set to get licensed:

1. Take the Strata Management Licence Course and Examine offered by the Real Estate Division of the UBC - Sauder School of Business. It is a self-paced correspondence course comprised of 20 multiple choice assignments and 3 hour multiple choice final exam.

2. Individuals may register for the course at any time and have one year from the date of registration to complete the course, however, the Real Estate Council estimates that most individuals can expect to complete it in six months based on completing one assignment a week and spending 10 to 12 hours per assignment.

3. Prior to the registering for the strata management licensing course and exam they must satisfy the language proficiency requirements (or demonstrate that they are fluent in English).

4. Once the course has been successfully completed, application is made to the Real Estate Council for licensing to provide strata management services.

5. Note that both the company and the individuals must be licensed. The company would be licensed as a corporate entity (the "Brokerage") and the individual as a Managing Broker with potentially other employees licensed as well.

5. Alternative

A number of hotel operators have avoided the licensing requirement by contracting out all "strata management services" to a strata management company. They have a licensed strata management company provide those services and have the hotel operator carry out the non-strata work. It is difficult to allocate the work between the strata manager and the hotel manager to stay "outside" the RESA requirements given the wide ranging definition of what falls within the definition of strata management services and property management services, but is how many strata hotels have proceeded.

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