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Bylaws – Why Bother?

Sharon Kelly, President
SHARON KELLY CONSULTING SERVICES INC.

The Standard Bylaws in the *Strata Property Act* ("Act") will become effective January 1, 2002. Many strata corporations are facing the possibility of rewriting their bylaws so that they comply with the new Act. While some say, "Why bother?" Here are some reasons to take on the task:

1. RENTAL RESTRICTIONS

Many strata corporations have some form of a rental restriction bylaw. The owners may have the desire to keep the number of renters to a minimum, with the belief that renters will not be as respectful to other residents and common property. Other motivations may include a desire to have an 'adult oriented' community and so choose to combine it with a rental restriction bylaw. Under the new Act, a bylaw can prohibit all rentals (subject to a hardship application and other exemptions). Family members who rent have some special protection under the Act and new time frames have been established for bylaw compliance. Because of these changes, many bylaws may no longer be valid effective January 1, 2002. That is a good reason for re-writing the bylaw!

2. AGE RESTRICTIONS

This has always been considered a tricky bylaw to write as the *Human Rights Code* applies as well as the Act. Many strata corporations still have a bylaw that does not reflect case law on age restrictions, such as stating an age limit of 45. What is often frustrating for strata corporations is that an age restriction bylaw usually doesn't apply to renters. That is why age and rent restriction/prohibition bylaws are often seen in tandem. If strata owners want to have an adult oriented complex an effective bylaw is necessary. Since the Standard Bylaws do not address this issue your strata should carefully review and amend any existing age bylaw.

Sharon Kelly, experienced mediator, arbitrator and President of Sharon Kelly Consulting Services Inc.. Ms. Kelly has an extensive background in property management and has taught courses at various colleges and private institutions. She is a member of the B.C. Arbitration and Mediation Institute and holds the designation "Chartered Arbitrator." She has experience in mediating construction and condominium disputes and currently serves on the Board of Directors of The Mediation Development Association of B.C.. She is also listed on the B.C. Mediator Roster Society.

3. FINES

Many strata corporations use fines as a method to enforce bylaws. Often a more significant bylaw results in a more significant fine. Many of these bylaws may be invalid as of January 1, 2002. The Standard Bylaws provide for a maximum fine of $50 per contravention. Is that enough for your strata? Or, could your existing fine structure be too high or set up incorrectly? The regulations provide for a maximum fine bylaw of $200 (except for rent restriction bylaws that can be as high as $500). How do you establish the breach? By the day, week, or month? The regulations now establish that the strata corporation can fine every 7 days with a continuing contravention of a bylaw. It is important to make sure that your bylaws don't violate the Act and the regulations, otherwise your strata may be restricted to minimal fines.

4. COUNCIL BUSINESS

The Act gives new direction to conducting council business. Your current bylaws could contradict the Act and if so, amending them makes sense. In the Standard Bylaws all council

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meetings are open to observers. While transparency in governance is a good practice - is this what your strata wants? These types of governance issues require the attention of owners.

So why bother? Because this is a great opportunity for strata corporations to clean up their bylaws – and at the same time build consensus in their community as to what are appropriate bylaws. It is also a proactive step to determine whether your bylaws will be enforceable. Every community is different, so bylaws need to be tailored to those needs. Why not hold information meetings – talk about the issues in your strata and see how they might be structured in a bylaw? In my experience, some owners may prefer to restrict a variety of activities; others will have a more laissez-faire attitude. Inviting owners to discuss bylaw changes before they are formulated into a resolution can avoid many heated debates at your General Meeting. Then, everyone feels as though they participated in the process. Once bylaws have been drafted through consultation with owners, I suggest having them reviewed by a condominium lawyer to ensure that they do not violate the Act or any other statutes. Extra work? Yes. Worth it? Absolutely!

Editorial –
Will Your Bylaws be Ready?

Cora D. Wilson, Condominium Lawyer
C.D. WILSON LAW CORPORATION

If you do nothing before January 1, 2002, the Standard Bylaws attached to the *Strata Property Act ("SPA")* will apply to your strata corporation. You may unwittingly have bylaws registered in the Land Title Office which conflict with SPA or the Regulations. You may be surprised to discover that some of these bylaws may be unenforceable.

Previously registered bylaws may conflict with the Standard Bylaws attached to SPA. Some strata corporations have enjoyed numerous bylaw amendments which have been registered in the Land Title Office over the years. It is not unusual to find conflicting bylaws which have not been repealed or killed. The issue becomes, "Which bylaw prevails?" The common belief is that the bylaws which were last registered prevail. This is not the case. This type of unnecessary and potentially damaging debate may be avoided with a proper bylaw review process.

In rare cases, strata corporations have repealed all the Part 5 Bylaws of the *Condominium Act* with the result that they have no bylaws at all. They will be operating in a vacuum until January 1, 2002 when the Standard Bylaws automatically apply to their strata corporation. Arguably, they may be in a better position than other strata corporation suffering from conflicting bylaw syndrome.

Some strata corporations have properly approved bylaws by a 3/4 vote at a general meeting. However, they have failed to register them in the Land Title Office. These bylaws are not effective. In other words, it is as if the bylaws had not been presented for approval at all.

Disputes frequently arise over the interpretation or the enforcement of bylaws. Disputes cause political rifts, they tend to be time consuming and may be costly if lawyers become involved. SPA has provided every strata corporation with a prime opportunity to conduct a complete overhaul of the bylaws. This process properly carried out hopefully will eliminate some of the unnecessary pitfalls noted above.

One of the most important elements of the bylaw review process is to ensure that the membership is involved in the bylaw making process. Once a draft set of bylaws is available for distribution to the owners and tenants, then the strata corporation should call an information meeting for the purpose of discussing each bylaw and receiving input.

It should be highlighted that input is just that - input. The proposed amendments should be vetted to determine the following:

- Are they unenforceable?
- Do they contravene SPA or the Regulations?
- Do they contravene the *Human Rights Code* or any other law?
- Do they conflict with other proposed bylaws or the Standard Bylaws?
- Are they arbitrary, discriminatory or unreasonable?

There are many other questions which should also be addressed. If in doubt, consult with appropriate legal advice.

A WORD ON REPEAL

If bylaws have been previously registered in the appropriate Land Title Office, then these bylaws apply to your strata corporation, rightly or wrongly, until they are addressed. They may either be retained, amended, repealed or repealed and replaced. If they are retained or amended, the above considerations apply. If they are repealed, then the wording of the repeal should be very specific.

You may not wish to repeal a bylaw. You may wish to retain it for legal reasons. For example, if you have a *valid* rental limitation bylaw currently registered at the Land Title Office, you may wish to retain this bylaw as opposed to repealing it so that you avoid the "one year grace period" which applies to new rental bylaw. Section 143(1) of SPA provides that such a bylaw does not apply to a strata lot until the later of one year after a tenant ceases to occupy the strata lot and one year after the bylaw is passed. Amendments to an existing bylaw are fraught with pitfalls. However, if done properly, it may be possible to circumvent this surprising "one year grace period".

The vast majority of council members are lay people. They should consider either consulting with legal advice to assist them with the bylaw review process or acquire one of the many bylaw packages available in the condominium community.

SPA - Consumer Protection Legislation?

Gerry Fanaken, Property Manager
VANCOUVER CONDOMINIUM SERVICES LTD.

Most of us have been working with the new *Strata Property Act* ("ACT") for about one year now and it is hard to escape the prevailing theme of the legislation – consumer protection. At first, the Act appears to simply be a well-organized order paper of "dos and don'ts" for strata corporations (typical administrative law) but after a while it becomes apparent that it is written very much to protect minority interests. Indeed, there are sections of the new statute that have the "big brother" philosophy.

The leaky condo crisis of recent years has exposed the internal administrative process of strata corporations to public scrutiny. We must remember that strata corporations are, in fact, private organizations; they are not public enterprises or quasi-crown corporations. Yet in many respects the new statute appears to have overlooked this fine point and has placed a substantial and onerous burden on the shoulders of strata corporations to expose every working detail to anyone who may ask. While I certainly have sympathy for buyers of condominiums who need some protection lest they end up saddled with an enormous special levy for construction repairs that they were not alerted to, the problem is that the legislation, in my respectful view, has invaded private territory. Just imagine similar legislation for the buying public in other merchandise.

Gerry Fanaken, Author, Educator and President of Vancouver Condominium Services Inc., Vancouver. Mr. Fanaken has been actively involved in the administration of strata corporations for over 25 years. His company currently manages 225 residential strata corporations which represents approximately 13,000 individual condominiums units.

I suspect that few strata councils have turned their minds to Sections 35 and 36 of the *Strata Property Act.* These sections require a strata corporation not only to create, retain and maintain a vast array of records of the administration, but also to make them available to virtually anyone upon request. Call it the freedom of information concept if you like. I will not recite all of the provisions of Section 35 in this article but generally it requires the strata corporation to maintain not only such normal items as accounting data and minutes of meetings, but also detailed information about owners, mortgagees, tenants, assignments of rights and council members' phone numbers. A strata corporation must also retain copies of all administrative documents including resolutions, written contracts, decisions of an arbitrator or judge and, get this, legal opinions obtained by the strata corporation. Just think about that for a moment. A strata council finds itself in a difficult situation and obtains a legal opinion to assist in its decision making process. This opinion is public property!!

Try this one on for size. The strata corporation must retain copies of correspondence sent or received by the strata corporation and, at Section 36 of the Act, the strata corporation must, on receiving a request, make this correspondence available for inspection to an owner, tenant or any person authorized by an owner or tenant. That, of course, means just about anyone. The request must be fulfilled within two weeks and the strata corporation can charge 25¢ a copy if copies are requested. If copies are not requested and the requestor simply wants to review the material, they are permitted to do so without any charge at all.

As some of you may know, I am in the strata management business and we have discovered in the last several months that these provisions of the statute are creating huge problems for strata councils. On the one hand they are obliged to respect the law and abide with it but on the other hand they are finding themselves trapped between the need for confidentiality and the potential risk

for legal action for liable, slander, etc.. Indeed, an innocent owner writing a letter to the strata council complaining about the conduct of a neighbour now exposes himself/herself to possible retribution. Typically such complaints in strata corporations deal with stereo noise but what if the problem strata lot was owned by a biker-gang thug and there were drug dealings and other criminal matters being transacted? Would you feel comfortable in writing a letter to the strata council reporting such activities and requesting assistance and compliance with the bylaws of the strata corporation? What if the strata council decided to obtain a lawyer's opinion as to how to proceed in this matter. The legal opinion would be public property and freely available to the thug causing the problem in the first place.

For me, this provision of an otherwise excellent statute is a big worry. My guess is that the legislators really did not consider the impact of this far-reaching and invasive provision in the statute when it was written. I wonder what the response would be from the government if one of us asked to see copies of all of the correspondence in the Cabinet or to get copies of legal opinions obtained on various issues faced by the government? I think I know the answer.

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SPA - A Property Manager's View After Seven Months.

Ian Stuart, Property Manager
NEWPORT REALTY PROPERTY MANAGEMENT

Ian A. Stuart, a property manager for over 12 years in Victoria. Ian works primarily with Strata Corporations for Newport Realty Property Management, a company with a strong presence in the strata management field in Victoria.

Since July 1, 2000 strata councils and property managers have not only been busy looking after governing their strata corporations, but in addition they are learning some new ways to do the job. Some matters have remained essentially the same and the public at large and strata corporation owners in general haven't really noticed a great deal of change.

Behind the facade of normalcy, strata councils and property managers have been very busy learning the in and outs of the now required procedures under the *Strata Property Act*. A change of labels, Chairman to President, Extraordinary General Meeting to Special General Meeting, service procedure for notices, etc. are only some of the many items that have changed.

Property managers and strata council have started to devote a great deal of time to bylaw updates. Much confusion continues to exist about this topic with some strata lot owners believing that the new Standard Bylaws included in the *Strata Property Act* are now in use for their strata corporation. This is only true if your strata corporation has adopted them by a 3/4 vote at an Annual or Special General Meeting.

Some of the old bylaws registered at Land Title Office, including part of the Part 5 Bylaws of the *Condominium Act* may not be valid after December 31, 2001. Property managers are by now well aware that if nothing is done to replace or amend a strata corporation's bylaws that do not conform to the *Strata Property Act* by December 31, 2001, the task of managing a strata plan will become even harder.

Another area requiring attention is that of record keeping including compiling of facts and figures necessary to complete *Information Certificates* and provide information to owners and realtors. All of this has and is taking more time for property managers.

Many experienced property managers had become very familiar with the old *Condominium Act*. They relied upon this knowledge to deliver timely and efficient strata management services. The many significant changes in the new Act are causing property managers to spend considerable additional time realigning their own policies and procedures in order to meet the new requirements. As the reader can imagine, this new knowledge takes time to both acquire and implement. The property management business requires the efficient delivery of services to be profitable. Many strata owners will notice that strata management fee increases have been instigated to return profitability to the industry as a result of the extra cost for time and effort being put forth. With a desire to provide both a voice and sounding board for the changes and issues that surround the new *Strata Property Act*, an organization has recently been formed to assist the owners of strata management companies. The *Strata Property Agents of British Columbia* (www.spabc.ca) have been busy organizing and compiling both information packages (agent Liability, contract/bylaw updates, etc.) and seminars for agents to keep abreast of the developing issues.

One issue not directly related, but significant in nature, is the recent Provincial Government White Paper on the licensing of strata managers. The writer will not provide comment on the merits of either approach suggested in the Paper. The *Strata Property Act* has no doubt been a catalyst for this action by the government. Licensing in any form will take time to come into force. During the time interval, property managers should be reviewing their contracts with strata councils to ensure that a clear understanding of duties and liabilities is achieved.

The past few months have been a busy learning period for all parties involved with the new *Strata Property Act.* The government has also been busy developing a series of instructional guides (available at www.fic.gov.bc.ca) to assist property managers, strata councils and owners in dealing with the changes brought about by the new *Strata Property Act.*

What Does The Bylaw Package Provide?

1. The guide provides a Step-by-step, do-it-yourself format for the preparation of your bylaws.
2. The guide includes:
   a) A step-by-step process is outlined in the beginning of the package. This ensures that the strata corporation, usually comprised of lay people, directs its mind to every major issue which needs to be addressed.
   b) The steps include a description of what should be done at every stage of the bylaw process, including:
      - how to deal with unit owners
      - how to undertake the bylaw review process
      - how to amend bylaws
      - how to repeal bylaws
      - how to draft bylaws
      - how to deal with the presentation of bylaws at a general meeting
      - how to register bylaws

   c) The guide is a user friendly guide structured to direct lay people on how to properly address bylaws. The instructions are written in lay people terms.
   d) The package provides a review of **every** provision of the Standard Bylaws to the *Strata Property Act*, including a recommendation on what to do with the bylaw. Also, the wording of typical proposed amendments is included.

      For example, you may wish to provide for a bylaw which permits a non-owing spouse to sit on the strata council. The sample wording is provided for your convenience.
   e) The package provides a review of **every** provision of the Part V Bylaws to the *Condominium Act*, including recommendations on what to do with each provision.

      For example, to avoid the one year grace period provided for s. 143(1), SPA, for new rental bylaws, we recommend that the old registered rental bylaw, assuming it is valid, be kept. If it is repealed and replaced with a new bylaw, then the one year grace period will apply. Many strata corporations may wish to avoid this result.
   f) The package provides a review of the provisions of the *Strata Property Act* which permit additional bylaws, such as rental bylaws, interest bylaws, remuneration for strata council members etc.. The proposed wording for these types of bylaws is also provided.
   g) Further, a review of some of the relevant provisions for different types of strata lots, ie sections, commercial strata lots and residential strata lots, is available in a separate addendum.
   h) Finally, Land Title Office registration forms are attached with instructions for completion.

Bylaw review, preparation, completion and registration is an art. It is a complex, difficult and time consuming process which should not be taken lightly. Not all strata corporations have the funds or the budget to engage legal counsel for the purposes of completing this review. The result in some case is that strata corporations' bylaws are less than adequate. This may result in time consuming, complex and expensive legal proceedings to resolve unnecessary disputes. It is hoped that this Bylaw Package will minimize the pitfalls.

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Cora D. Wilson, Condominium Lawyer & Educator, C.D. WILSON LAW CORPORATION with offices in Nanaimo and Victoria. Ms. Wilson was called to the Bar in 1986 in Ontario and 1991 in B.C.. She currently represents condominium interests from Victoria to Port Alice and over to the Lower Mainland. She is a regular lecturer on Condo issues at Malaspina University College, Strata-Sphere and numerous other professional organizations. She is the editor of 'Voice from the Strata-Sphere.'

On January 1, 2002 your current Bylaws will no longer exist.

The Standard Bylaws of the *Strata Property Act* come into effect.

Review and update your Bylaws before December 31, 2001 to avoid confusion or unenforceable bylaw issues. This process may take several months. Start now!

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"Full Repair" Or A "Partial Repair" - That Is the Question!

Brian M. Chatwin
CHATWIN ENGINEERING LTD.

How many of you have had this happen to you? You hire an engineering company to do a building envelope assessment on your building, and you get a report that says you have two options:

- A full repair, or
- A partial repair

Then you are asked to make a choice.

You are told that a portion of the building shows high moisture content in the wood, evidence of rot and mould. They say this section should definitely be repaired as soon as possible. They then go on to say that the rest of the building is suspect to premature failure and that it might be a good idea to do a retrofit on all of it now to avoid disruptions in the future. The only catch is, a full repair is 4 times the cost of a partial repair.

Sound confusing? Well, it is to me and I am sure it is to most people.

It is like going into a garage and asking a mechanic to give you an estimate to fix your car. He tells you that you have two options, either a major tune up for $500, or a re-built motor for $2,000. It would appear there are many unanswered questions with a recommendation such as that.

This is in effect what is happening when a building envelope report recommends two options, a partial repair and a full repair. There are many unanswered questions that the consultant should address with the strata. What the consultant is attempting to say is that a section of the building definitely needs an immediate retrofit. He is probably also saying that the rest of the building is suspect in its' ability to provide the necessary moisture protection through the life of the building and that there will be premature failure of the building envelope well before the end of its anticipated life.

What does that mean? It means that the consultant has found strong evidence that the moisture content in some wall areas of the building are presently not at an unacceptable level. However, all the conditions are there that would make this wall construction vulnerable to develop moisture problems in the future.

So how do you decide what to do? In order to make a decision between the two so called "options", you will need some further information which should be provided by your consultant. These are summarized as follows:

- Confirmation by the consultant that the condition that exists on the remaining part of the building is not presently causing damage to the building.
- An estimate from the consultant as to how long it will take until there is premature failure of that section of the building envelope.
- A cost estimate at a later date to repair the remaining parts of the building, assuming that the partial repair had been completed earlier?
- An estimate of the anticipated increased annual maintenance costs if the repairs are not made at this time.

With this information, a life cycle cost analysis can be made of the two options to determine the most cost effective method of retrofitting the building envelope on this building.

The consultant should layout a present worth calculation of the two options to determine the least costly solution of repair using the two alternatives. This is not an unusual calculation for engineers as it has been part of engineering economic calculations for decades.

It should be noted that the calculation is a little more complicated by the fact that the Homeowner Protection Office offers interest free loans for work conducted on projects at this time. This interest free loan may not be available several years from now if the partial solution is selected.

Now you will have a present worth calculation that will allow you to compare apples to apples. You will then be able to consider the non-quantitative items such as the limited warranty on partial repairs, the resale value of a strata with partial repairs, and how a partial repair decision will affect any legal action you may be taking to recover your costs.

So how do you go about ensuring that you are armed with the proper analysis and decision making tools at the end of the building envelope condition survey by your consultant? Ensure that you have proper and effective terms of reference available to the consultant prior to commencement of the work. This will ensure that not only will you get what you pay for, but that you will have a usable tool at the end of the day to make a decision on the options.

If you are starting out on a project, I will provide you with terms of reference at **no charge** outlining what you want from your building envelope condition report. You may reach me at (250) 753-9171.

Brian Chatwin, P.Eng. is a Professional Engineer who specializes in contract administration. Mr. Chatwin has over 25 years of experience in this field and has successfully administered many construction contracts in the field of construction engineering.

Consequences of Building "BIG BUILDINGS" with "SMALL BUILDING" Standards!

Determining Building Height and Area may be Crucial

W. M. Maudsley, P. Eng., C. P., Principal
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INTRODUCTION

Failure to meet the big building requirements of the British Columbia Building Code (the "Code") in effect at the time of construction may have substantial negative consequences from a fire and seismic perspective. These are significant health and safety issues. "Does your building meet these basic minimum requirements?" This is a question many strata corporations should be asking.

HOW TO DETERMINE "BIG BUILDING" VS. "SMALL BUILDING" REQUIREMENTS

Many of the basic requirements of the Code are affected by the building height, in storeys, and the building area. In fact, the building height and area influence whether a building must be designed to the more rigorous requirements of Parts 3, 4, 5, and 6 ("Big Buildings") of the Code rather than to the requirements of Part 9 ("Small Buildings")

In order for a building to be designed as a Small Building, it must meet the following criteria:

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- the major occupancy classification of the building must be Group C, Residential, Group D, business and personal services, Group E, mercantile, or Group F, Divisions 2 and 3, medium and low hazard industrial,
- the building must be no more than 3 storeys in height, and,
- the building area must not be greater than 600 m^2.

Thus, it is important that the building height and area, as defined by the Code, be established at the outset of a project. These considerations should also be reviewed for compliance by any strata corporation going through the remediation process due to the "leaky condo" syndrome.

In the following paragraphs, the Code definitions of building height and building area, along with certain other terms which affect determination of height and area, will be reviewed. Words shown in italic font are terms that are defined in Part 1 of the Code.

BUILDING AREA

The Code defines building area as follows:

> *Building Area* means the greatest horizontal area of a *building* above *grade* within the outside surface of exterior walls or within the outside surface of exterior walls and the centre line of *firewalls*.

The building area is not the same as the *floor area*. The *floor area* is always less than the building area since it is measured to the inside of exterior walls and spaces such as service shafts or stair wells are not included in the determination of *floor area*.

From the foregoing definition, it appears that before we can determine the area of a *building*, we must know what a building is, what *grade* is, and what a *firewall* is and whether there is one.

The Code definition of *building* is very broad and all encompassing:

> *Building* means any structure used or intended to be used for supporting or sheltering any use or *occupancy*.
>
> *Occupancy* means the use or intended use of a *building* or parts thereof for the shelter or support of persons, animals or property.

Under these definitions, a shelter at a bus stop or a catalytic cracker in an oil refinery are both buildings. Applying the requirements of the Code to a catalytic cracker would be challenging to say the least and the Code recognizes this by permitting such structures

to be dealt with as special structures which can be designed using "good engineering practice". The requirements applicable to the bus shelter are trivial. In any event, the Code clearly applies to any multi storey multiple family building.

We will discuss the definition of *grade* in the section of this article dealing with building height.

A firewall is a special beast:

> *Firewall* means a type of *fire separation* of *noncombustible* construction which subdivides a *building* or separates adjoining *buildings* to resist the spread of fire and which has a *fire resistance rating* as prescribed in this code and has structural stability to remain intact under fire conditions for the required fire-rated time.

The Code contains detailed requirements for firewalls, the key ones being:

- it must be of concrete or masonry construction,
- it must be complete from the ground through the roof of the building (except for some special conditions),
- it must be able to remain in place if one of the buildings on either side of it collapses due to fire, and,
- the aggregate area of openings through the firewall is severely limited.

The intent of the Code requirements are that a firewall should be able to withstand total burnout of the building on one side of it without the fire spreading to the building on the other side. Thus, it is considered reasonable to treat the structures on each side of a firewall as separate buildings when applying the Code to the design of the buildings.

From these definitions then, to determine the building area for most buildings, we must first identify the *storey* with the largest area, which is usually but not always the ground floor, and establish whether there are one or more firewalls in the building. With this information in hand, it is a straight forward, if tedious, operation to calculate the building area.

The determination of building area is not so simple for buildings of unusual configuration such as a building where floors may be offset to create overhangs or setbacks. Also, in some circumstances where a basement parking garage protrudes above ground level, the area of the parking garage may be taken as the building area.

BUILDING HEIGHT

From the Code

> *Building height* (in storeys) means the number of storeys contained between the roof and the floor of the *first storey*.
>
> *Storey* means that portion of a *building* which is situated between the top of any floor and the top of the storey next above it, and if there is no floor above it, that portion between the top of such floor and the ceiling above it.
>
> *First storey* means the uppermost storey having its floor level not more than 2m above *grade.*
>
> *Grade* (as applying to the determination of *building height*) means the lowest of the average levels of finished ground adjoining each exterior wall of a *building*, except that localized depressions such as for vehicle or pedestrian entrances need not be considered in the determination of average levels of finished ground. (See *First storey.*)

To determine *grade*, we must establish the ground elevations around the perimeter of the building, average these elevations along each building face, ignoring any changes at windows, doors and vehicle entrance ramps, and identify the lowest average elevation. This, by definition, is the elevation from which we determine the height of the building.

This all seems straightforward enough. However, some judgement is required in the application of the definition of grade. For instance, the definition does not address the issue of how far away from the building face the ground must be maintained at more or less the same elevation. That is, there is nothing in the definition that says that the ground cannot fall away at, say, a 60° angle with no level surface adjacent to the building face. The Code also does not address the issue of fill held in place by a retaining wall nor does it address the question of sloped fill. It also does not consider the relationship between grade and the elevation of fire department access routes, either public streets or private roads. At one time, the City of Vancouver required that the ground elevation be determined 3m away from the building face. Further, the City would not accept fill to raise the ground elevation on the basis that the fill would slough away in a significant earthquake. There has been at least one instance where a berm which was used to raise the *grade* at a building face washed away in a heavy rain.

There is an exception to the rule for determining building height which can be applied to residential buildings three storeys or less in *building height* on sloping sites. Provided each portion of the building is separated from adjacent portions by a *fire separation* with a 1h *fire resistance rating* which has no openings (i.e. no doors or windows) and the separation extends through all storeys, including service spaces, then each separated portion may be considered as a separate building for purposes of determining *building height*. A limitation on this application is that an entrance to each portion of the structure must have an unobstructed path of travel from the nearest street to the entrance that does not exceed 45m in length.

CLOSURE

The rules given in the Code for the determination of building height and area are generally straight forward although some judgement is required in establishing the official grade for the building. Nevertheless, mistakes do get made with the result that, when an application is made for a building permit, it is found that the building inspector will not permit the building to be constructed under the provisions of Part 9 of the Code. This can require extensive redesign of the building, either to bring the design of the building into conformance with Big Building requirements (Parts 3, 4, 5, and 6 of the Code), or to permit construction to proceed under the Small Building requirements (Part 9 of the Code). This can be costly in both time and money. Therefore, it would be prudent to review these issues with a building code consultant at an early stage in the design of your Leaky Condo retrofit.

Selecting a Building Envelope Renovator

THE HOMEOWNER PROTECTION OFFICE

As owners of leaky homes take on the repair process, the Homeowner Protection Office frequently is asked questions about the role of a building envelope renovator and how to select one that would be appropriate. These guidelines provide some simple answers to frequent questions to help homeowners with this important selection process.

The Homeowner Protection Office is a provincial Crown corporation established to increase consumer protection for homeowners and bring about an improvement in the quality of residential construction. The HPO's program areas include: licensing of residential builders, setting the standards for and monitoring the third-party home warranty insurance system, a research and education function in the areas of consumer information and building science, and financial assistance for owners of leaky homes.

WHAT DOES A BUILDING ENVELOPE RENOVATOR DO?

A building envelope renovator is a contractor that performs building envelope renovations. The contractor will work with your building envelope consultant to implement the repair strategy approved by the strata owners.

Building envelope renovators are responsible for fulfilling the obligations of the construction contract, coordinating the trades, supervising the site, construction safety, confirming that the materials to be used meet the standards outlined in the project documents, building in accordance with building codes, regulations, standards, and working in agreement with the specifications provided and accepted by your municipality.

REQUIREMENTS FOR MANDATORY LICENSING OF BUILDING ENVELOPE RENOVATORS AND MANDATORY THIRD-PARTY WARRANTY INSURANCE:

Consumer protection regulations for building envelope renovations were recently introduced. As of September 30, 2000 in order to get a building permit, repair contractors who perform building envelope renovations must be licensed by the Homeowner Protection Office and arrange for mandatory, third-party warranty insurance on applicable building envelope renovations. In geographic areas where building permits are not required, licensing and arrangements for warranty insurance must occur prior to the commencement of the renovation.

Minimum coverage and standards for warranty insurance covering building envelope renovations are now set by the provincial government. The minimum coverage will always include 2 years on labour and materials. If 60% or more of any wall is replaced, a 5-year warranty on water penetration is also provided.

FINDING A BUILDING ENVELOPE RENOVATOR:

A registry of Licensed Building Envelope Renovators is available on the Homeowner Protection Office Web site at www.hpo.bc.ca or by calling the Homeowner Protection Office toll-free information line at 1-800-407-7757.

Also, your building envelope consultant, construction lawyer or property manager may be able to provide some suggestions of appropriate building envelope renovators to consider. You can also get referrals from other strata corporations that have gone through similar major repairs.

SELECTING A BUILDING ENVELOPE RENOVATOR:

It is important to thoroughly investigate each building envelope renovator's experience and successes. Working with the strata corporation's building envelope consultant, the following questions

should be asked about any building envelope renovator bidding on the repair project:

- Are they licensed by the Homeowner Protection Office as a Building Envelope Renovator?
- What type of warranty insurance will be provided on the building envelope renovation – a 2-year warranty on labour and materials, the 2-year labour and materials warranty with a 5-year water penetration warranty (available when 60 percent or more of any wall is replaced) or better?
- What other major repair projects have they done? What was the dollar value of the project(s)? Was the form of the development(s) they have repaired in the past similar to your own (for example, four-storey apartment, townhouse project)? Were the repairs successful?
- What references can they provide, preferably from other strata corporations that completed their repairs in the past year? Are the strata corporations still satisfied with the work?
- Have there been any legal actions against the building envelope renovator for inadequate repairs? Have any complaints been registered with the Better Business Bureau against this contractor?
- How long have they been in business using their current business name?
- What is the level of training and skill of the trades persons? The strata corporation can request that the building envelope renovator submit a list of their trades persons outlining their qualifications.
- Does the building envelope renovator have sufficient labour to undertake this type of repair and achieve the turnaround time required for the repair?
- Are they bonded, insured, and do they have Workers' Compensation Board coverage?
- What is their fee structure?

The selection of contractors should be based on reputation, qualifications and experience first. Price should be a secondary consideration.

MORE INFORMATION ON BUILDING ENVELOPE RENOVATIONS FOR OWNERS OF LEAKY HOMES:

The Homeowner Protection Office holds on-going workshops on the process of managing building envelope renovations. Repair Process Seminars are planned for Victoria on Saturday, March 24 and in Nanaimo on Saturday, May 12.

These free, two-hour seminars provide information on financial assistance available, the requirements of building envelope renovator licensing and mandatory third-party warranty insurance, legal considerations and details on the repair process. Those interested in attending can get more information and register through the Homeowner Protection Office toll-free information line at 1-800-407-7757.

Court Cases Answer Questions - But Not Always Definitively!

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The *Strata Property Act* and the supporting legislation is lengthy and complex. They introduce a quagmire of new issues that have not yet been tested by the courts. Many of us are struggling to determine how to properly address these new challenges. Legal decisions provide some clarity by interpreting otherwise grey areas of the law created by legislation.

A recent case may lay to rest some of the controversy over the following issues:

- If a lawsuit was commenced under the *Condominium Act* ("CA") and continued after the *Strata Property Act* ("SPA") was passed, which statute applies to resolve the dispute - the CA or SPA?
- Is a strata corporation able to assess a "leaky condo" repair expense or a large repair expense as part of the annual budget? A majority vote is required to approve a budget, whereas a 3/4 vote is required to approve a special levy.

Strata Corp. LMS 509 v. Andresen, [2001] B.C.J. No. 225, 2001 BCSC 201, Vancouver Registry No. L001137 (B.C.S.C.) ("Andresen") addressed these issues. In that case, the strata corporation consisted of 224 strata lots comprised of 182 townhouse type lots and 42 apartment type lots. The apartment lots suffered water penetration damage in the amount of $636,000.00 plus GST. The townhouse lots did not suffer from the "leaky condo" syndrome. A special resolution was presented at a general meeting purporting to create different types of strata lots. This resolution failed. The townhouse owners refused to pay their portion of a special levy arguing that this is a cost which should be borne solely by the apartment owners. The Court held that ***all*** owners were required to pay the assessment.

This case also addressed the issue of the validity of different "types" of strata lots for purposes of a repair levy. This discussion is beyond the scope of this article.

The above issues were addressed in the Andreson case, as follows:

1. WHICH STATUTE APPLIES - THE "CONDOMINIUM ACT" OR THE "STRATA PROPERTY ACT"?

Which law applies is a very important question. The transitional provision of SPA, section 293(1), provides as follows:

> "Except as otherwise provided by *this* Act and the regulations, this Act and the regulations apply to a strata plan deposited and a strata corporation created under the *Condominium Act*, R.S.B.C. 1996, c. 64 or any former Act."

In Andreson, the strata corporation argued that the relevant law was the CA. The CA was the act which was in force at the relevant time. Further, the proceedings were filed under the CA. The CA was later repealed by SPA on July 1, 2000. SPA was the governing statute at the time that the court decision was rendered.

Judge Skipp concluded that the legislature intended that SPA would apply except as otherwise provided in SPA itself. The Strata Property Regulation provided a specific mechanism for strata corporations who had created different "types" of strata lots under the CA to preserve the different types of strata lots under the SPA. As a result, SPA and the SPA regulations governed the Andresen dispute.

The SPA may not apply to all actions commenced under the CA. If this is an issue facing your strata corporation, legal advice should be obtained to consider your particular circumstances.

2. CAN AN ANNUAL BUDGET INCLUDE A MAJOR REPAIR ASSESSMENT?

Strata Corp. LMS 1328 v. Marco Polo Properties,[2000] B.C.J. No. 97, 2000 BCSC 776, Vancouver Registry No. C992292 (B.C.S.C.) ("Marco Polo ") and Tadeson v. Strata Plan NW 2644 [1999] B.C.J. No. 3091, Vancouver Registry No. A992067 (B.C.S.C.) ("Tadeson") were bench mark decisions in the area of strata corporation governance when addressing the issue of repair and maintenance assessments where a 3/4 vote of eligible unit owners at a general meeting was unattainable. The general rule is that a special levy requires a 3/4 vote of eligible voters at a general meeting.

In Marco Polo, the Court upheld the approval of a special levy for a leaky condo as part of an annual budget. An annual budget only requires a 51% vote of unit owners at an annual general meeting for approval, as opposed to a 3/4 vote for a special levy.

Tadeson, also a "leaky condo" case, followed the reasoning in Marco Polo. In that case, a 3/4 vote for remedial costs failed. However, 51% of the eligible owners at the general meeting voted in favour of the resolution. The court refused to make the unit owners wait until the next annual general meeting to obtain approval. The court ordered the strata corporation to levy the unit owners and perform certain repairs. The court also awarded costs against the strata corporation.

These decisions were rendered prior to SPA. SPA introduced new concepts. In order for a repair levy to be characterized as an operating expense for purposes of the annual budget, it must be an expense that usually occurs once or more each year (SPA, s. 91(a)).

In the Andreson case, Judge Skipp held that the strata corporation had made repairs to the building envelope annually. At the time that the last repair levy was proposed as part of the budget, the expenses to repair the building envelope of the apartment buildings had become a "normal, foreseeable and inevitable expense." The repairs were not future repairs - but imminent repairs. He concluded that these expenses would continue each year that the building is not repaired. In these circumstances, a repair levy could form part of an annual budget.

Is it safe to conclude that the Andresen decision is conclusive on these points? A case with different facts may well be decided differently. General rules of law will continue to apply when determining which statute applies to a particular issue. A legal opinion would be required to consider the particular circumstances on a case by case basis.

The Andreson case provides some direction in these uncertain times. However, it is not iron clad and the answers are by no means conclusive. There are still many grey areas created by SPA that will have to be tested in the courts.

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