

# Condos Q&A: Legal counsel advised for bare land condo owners

BY ROBERT NOCE, EDMONTON JOURNAL NOVEMBER 27, 2012

**Q:** Last month, your column referred to a recent Alberta Court of Queen's Bench decision that has serious implications for bare land condominiums. Can you please explain it?

**A:** Here is a simplified version of this important case. This decision (*Maciejko v. Condominium Plan No. 9821495*, 2012 ABQB 607) deals with a dispute between owners in a bare land condominium corporation and the corporation itself. Generally, bare land condos are housing structures — typically duplexes — which share a common wall and roof.

The bylaws provided that the condominium corporation, not unit owners, was required to repair and maintain the exterior of the individual units, making the condominium operate much like a traditional condominium. This condominium corporation was developed and marketed as a “care-free” development. As the justice noted, the approach was a great marketing idea, but probably, in hindsight, not sustainable.

A number of owners went to court to determine whether or not the bylaws were legal.

The bylaws created a new class of property called “managed property,” which treated the “managed property” as if it were common property. The term “managed property” is not defined in the Condominium Property Act. Unfortunately, the court determined that the approach the condominium corporation was taking with respect to the “managed property” was not permitted by the Condominium Property Act. As a result, the court concluded that the condominium corporation did not have the authority to pre-collect money from owners and deposit it into the reserve fund for the repair and maintenance of property that is not owned by the condominium corporation. In other words, the condominium corporation will not have the benefit of a reserve fund-like structure to deal with the “managed property” improvements, but rather the condominium corporation will have to fund these repairs and maintenance costs on a pay-as-you-go basis. The court recognized that this was a bizarre outcome.

**Helpful hint:** Please note that this is a “bare bones” summary of the decision (pardon the pun). If you live in or are on a board of a bare land condominium, I would strongly urge you to seek legal counsel to review your current situation and figure out your options.

**Q:** I bought a commercial unit in a mixed commercial/residential condominium building. In the condo plan, there are unit drawings and a simple schedule. The condo plan does not show the correct boundary for my unit. Furthermore, the table which contains the square metres and unit factors is incorrect. I think that the unit drawing and the unit factors are two important things, but the board argues that the unit factor does not have to come from the square metre. If I can prove the square metre figure recorded with the condominium plan is incorrect, can I force the board to make the correction?

**A:** First, the unit factors do not necessarily have to be based on the square metres of the units. Your condominium plan will set out and explain how the unit factors were divided among the units. Unfortunately, you did not provide me with those facts to help me answer your question. Each condominium corporation in Alberta must have 10,000 unit factors, which are then divided among the units. Second, if there is an error on the condominium plan, the condominium corporation, through the board, should take active steps to amend the plan and correct the error. If the error is costing you money in that you are being charged additional condo fees, then I would strongly urge you to seek legal counsel to force the condominium corporation to make the change.

**Helpful hint:** Your condominium plan is an important document; it is a public document and available at the Land Titles Office.

**Q:** Our mechanical room had a water leak, and there was dirty water going up into our condo unit. Epcor turned off the water and the board eventually took steps to try to fix the problem, but it persists. How can we deal with this?

**A:** If the water issue is the responsibility of the condominium corporation, then the condominium corporation must take active steps to fix the problem. If you are suffering damages as a result of the corporation's inability to fix the problem (or negligence), then you may have legal recourse against the condominium corporation for any damages.

**Helpful hint:** Water-related issues are serious; if not dealt with on a timely basis, there is a real potential that costs of repairs will increase significantly and other problems, such as mould, may arise. Boards should react quickly to this issue and resolve it.

**Q:** I am the president of a condo association. We will be commissioning a reserve fund study early in 2013. Is there a list of qualified reserve fund appraisers that we can contact in Edmonton without having to search the Yellow Pages and websites? We are a bare land condo and have minimal responsibilities. The condominium corporation is not responsible for the interior or the exterior of each home.

**A:** I would suggest that you contact the Canadian Condominium Institute (Northern Chapter) and ask for a list of possible names of people who do reserve fund studies. As well, you may want to contact the condominium corporation's lawyer to provide you with some names.

**Helpful hint:** I strongly urge all condominium corporations to have a lawyer on retainer. The corporation will only incur costs when the lawyer becomes engaged for a particular issue/file. At times you may have a simple question that requires a quick response, and there is a real benefit to the condominium corporation to have an ongoing relationship with a lawyer for a quick contact.

**Q:** Please explain when and how funds can be taken from the reserve fund.

**A:** Section 38(2) of the Condominium Property Act states that funds cannot be removed from the capital reserve fund unless (a) the removal of the funds for that purpose is authorized by a special resolution, and (b) after the removal of the funds, there will be sufficient funds remaining to meet the requirements of the capital replacement reserve study. However, the practice has been that a board

resolution is sufficient to comply with the Condominium Property Act. In a handful of some smaller condominium corporations, they use a resolution of all of the owners.

**Helpful hint:** If only the Condominium Property Act were clear on this point. I am hopeful that the provincial government will make the necessary changes to the Condominium Property Act to clarify this issue.

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