

Questions & Answers with Robert Noce



CCI member Robert Noce, Q.C. contributes a regular column to the Edmonton Journal, answering questions from readers about various aspects of condominium living. These are questions that tend to arise fairly frequently, so Mr. Noce and the Edmonton Journal have kindly allowed InSite to republish some of them for our continuing education on the condominium life.

Robert Noce, Q.C. is a partner with Miller Thomson LLP in both the Edmonton and Calgary offices. He welcomes your questions at condos@edmontonjournal.com. Answers are not intended as legal opinions; readers are cautioned not to act on the information provided without seeking legal advice on their unique circumstances.

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Q: Please provide your comments on the advisability of increasing condominium fees regularly to allow for inflation, repair and replacement costs. We have lived in our condo building for the past three years and have experienced only one five per cent fee increase. Our condo building is more than 20 years old. Recently, our property manager suggested a three per cent increase to our operating fund and a 4.7 per cent increase to our reserve fund, yet our board approved a zero per cent fee increase for the next year.

A: I believe that condominium corporations should increase condominium fees regularly to provide for inflation, as well as to address future repair and replacement costs to an aging structure. The adage applies: Pay me now or pay me later. If the condominium corporation lacks sufficient funds to deal with future repair and replacement costs, then the options will be to borrow the money or to hit every owner with a special assessment.

While the property may look more attractive with low condominium fees, if these fees are not meeting the day-to-day needs of the condominium corporation and/or the future repair and replacement costs, then the board, in my opinion, is not fulfilling its duties to the owners.

Hint: Budgeting correctly allows owners to pay monthly over a period of time, so that when future repair

and replacement costs are needed, the funds are available. Anyone looking to buy a condominium should take note of the monthly condo fees, and if the fees look too low, they should ask why. Then, they should ask themselves what are the future implication of artificially low condo fees.

Q: I have lived in our condo building for the past three years. Each winter, the parking lot is not cleared of snow on a timely basis. I have got stuck in the snow while trying to get out. The condominium corporation has also failed to clear the snow from the entrances, so sometimes residents have to do it. Are these grounds for legal action?

A: Although your question does not give me all the facts, I will assume that the condominium corporation has hired a third party to clear the snow in the parking lot and side-walks. From your description, it would appear that the person doing the work has not been doing it well. This is an issue for the board to address. If the third party hired to clear the snow is not fulfilling its obligations under the contract, then the board should take active steps to deal with it. If, however, the contract allows the third party to clear the snow at any time, then there may not be any breach.

This is not an issue that requires legal action, but rather you should contact the board and get more facts to understand why the work

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is not being done on a timely basis. If the board is not performing its duties properly, then at the next annual general meeting, elect a group of people that will meet your needs.

Hint: Most day-to-day maintenance issues arising within a condominium setting do not require legal intervention. Rather, owners should take steps to get more information from the board to understand why certain things are done a certain way.

Q: Our condominium board allows pets "with permission from the board," but there are no set criteria as to what type of pets are allowed. We have brought a small dog into our condominium unit, and one board member told us not to bother asking for permission, because it would be denied.

Should there be rules for what pets are allowed? Also, we have noticed that there are various bylaws being broken, but no action is taken by the board, except for trying to enforce the unclear pet clause.

Shouldn't the board be treating all bylaw enforcement the same

and not targeting one in particular?

A: There is no legal requirement for the board of the condominium corporation to have a "set criteria as to what type of pets are allowed". The bylaws are the key document on this issue. However, there is a recent Alberta Court of Queen's Bench decision which suggests that the board must ensure that due process is followed when an owner seeks permission from the board on an issue.

Still, Alberta courts generally give condominium boards a great deal of deference. With respect to your other question, boards do not have any discretion as to which bylaws they will or will not enforce. If the board is aware of a breach, it must act to enforce the relevant bylaw.

Helpful Hint: As long as boards are following the law and due process, and applying the same rules to all owners in line with the bylaws, the courts will generally support a board's decisions.

Q: I have been on my condo board for one year. It is a small board with only three members. What

happens when there is no elected board? I have heard that a trustee would take over.

A: Every condominium corporation is required to have a board. The board is the controlling mind of the condominium corporation. If none of the owners and/or tenants (depending on your bylaws) want to sit on the board, then you have a real problem. There are certain provisions under the Condominium Property Act that would allow the condominium corporation to apply to court and have an administrator

appointed to run the condominium corporation.

I would view the administrator as the last resort and not as an alternative to a board. The cost of getting a court order and hiring an administrator would be significant, causing owners to face increases in their monthly condo fees.

Helpful Hint: All owners have a responsibility to ensure the viability of their condominium corporation. It is incumbent on all owners and/or tenants (depending on your bylaws) to become active in some form within

their community.

Q: Who is responsible for repairing a faulty drainage pipe, the owner or the condominium corporation? This is a bare land condominium with 58 duplexes and one single family home.

A: The answer depends on where the drainage pipe is situated. If the repair is made below property owned by the condominium corporation, then that is who will have to cover repair costs. The same would be true if the faulty pipe were located under lands owned by an owner. A review of your condo-

minium plan should assist you in answering this question. You may need to consult a lawyer on this issue.

Helpful Hint: The condominium plan is an important document for helping parties understand the boundaries of what common property is and what is, the responsibility of individual owners. For example, the condominium plan will indicate whether doors and windows are part of the units or are common property.

Q: When I bought my condominium unit, I noticed



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that the reserve fund was quite low. I called the management company to see why no funds were being allocated to the reserve fund annually. They stated that the owners prefer to keep condo fees low, and are willing to accept a large special assessment for future needs as they come due. Doesn't the condo board have to ensure that funds are contributed to the reserve fund every year? Can the board members be held personally liable for not making decisions responsibly?

A: First, if the reserve fund is insufficient to meet the future repair and/or maintenance obligations of the condominium corporation, then the owners will be called upon to pay for those additional costs. The condominium corporation could issue a special assessment or take steps to borrow the money, usually at higher interest rates than individuals are able to obtain from banks.

Every condominium corporation is required to conduct a reserve fund study, and I believe that a board that ignores the reserve fund study is not fulfilling its duties to the corporation or the

owners.

To answer the second part of your question, board members must exercise their powers and discharge their duties of office honestly and in good faith. If a board member does something, in their capacity as board member, that directly costs the corporation money, then that person can be held liable. It sounds like, in your case, it has been many years of a board simply not being brave enough (or smart enough) to increase condo fees to where they need to be in order to ensure that future maintenance and repair costs will be covered.

Helpful Hint: Anyone planning to purchase a condominium unit should determine the value of the reserve fund. If the fund is low and the building is old, requiring significant repairs and/or maintenance in the future, then you should be prepared to face a special assessment to provide the condominium corporation with sufficient funds to undertake the repairs and/or maintenance obligations. In my view, it is bad management on the part of the board to keep condominium fees artificially

low and not address future obligations of the condominium corporation.

Q: I bought a condominium townhouse last year. Two months later, I received a Notice of Special Assessment in the amount of \$1,800 to fix a drainage issue. Prior to purchasing, I had been advised that there were no special assessments or condo fee increases anticipated. There was nothing identified in the Estoppel Certificate, yet condo fees have been increased twice, plus the special assessment. Do I have any recourse with the

property manager for non-disclosure of this information? Had I known about the special assessment, I would have negotiated a lower purchase price.

A: There was a recent decision in the Provincial Court of Alberta whereby a purchaser sued the vendors, claiming that the vendors should be held liable for a special assessment levied against the unit which occurred shortly after the purchase was completed. The purchaser claimed that the vendors were liable by way of fraudulent, or at least neg-

ligent, representation. The vendors denied that they were liable for the amount of the special assessment, and claimed that nothing in the contract required them to provide the condominium documents as the purchaser claimed.

After reviewing the facts and the law, the court came to the conclusion that the vendors were liable for the special assessment, either as a result of their breach of contract or as a result of the misrepresentation made. This is a significant decision in that the vendors were then or-

dered to pay the purchaser the total cost of the special assessment. Therefore, it is possible that you may be able to bring a court action against someone alleging, among other things, fraudulent or at least negligent representation. You may want to consult a lawyer on this point.

Helpful hint: Each case will depend on its own facts. This recent decision will have implications for sellers, but at the same time, you need to ask yourself how much money you are willing to spend on legal fees to recover \$1,800.

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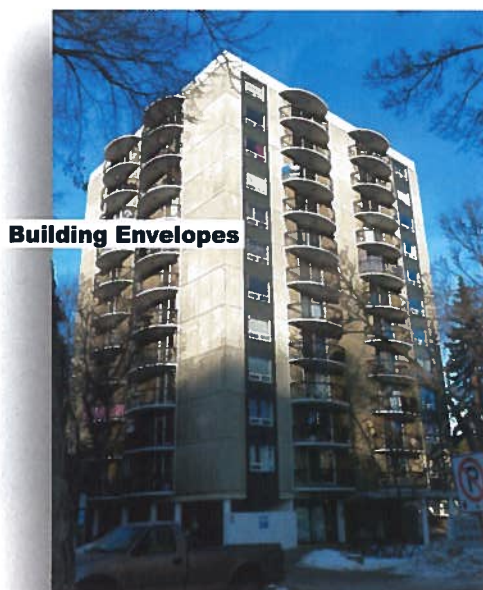
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