Summer 2007

Let's Talk Condo...

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Announcements:

The Living In A Condo booklet, authored by Audrey Loeb, is available to clients of Miller Thomson's Condominium Practice Group in electronic format for inclusion in resident Welcome Packages.

The *Private Investigators and Security Guards Act* has been repealed by the *Private Security and Investigative Securities Act*, 2005 S.O. 2005, c.43 and will come into force on August 23, 2007.

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ONTARIO'S LEADING CONDOMINIUM LAW PRACTICE

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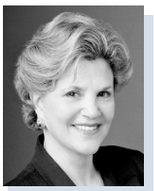
BOARD MEETING QUESTIONS



by
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Board meetings continue to give rise to many questions in our office. We are often asked about the quorum for meetings, the notice of the meetings and the conduct of the meetings. Here are some answers to frequently asked questions.

1. What is the proper quorum for a board meeting?

A quorum for a meeting of the board of directors is a majority of the number of board members. By-laws which provide for a higher quorum then a majority are, in our view, not valid since the *Condominium Act* does not authorize condominiums to set quorums higher than a majority.

2. Can board members vote by proxy?

Board members cannot appoint a proxy to either attend a board meeting or vote on their behalf.

3. Can board business be conducted by teleconference or other form of communication?

Board meetings can be conducted by telephone or other form of concurrent communication provided that the corporation has a by-law authorizing the board to hold meetings in this manner and all the board members agree. If no by-law is in place which includes that authorization, then to be counted as part of the quorum, board members must be in attendance.

4. Can a board member object to the holding of a board meeting if he or she did not receive notice of the meeting?

The *Condominium Act*, 1998 provides that any director who attends a meeting of the board is deemed to have waived the right to object to a failure to receive notice of the meeting, unless the director does so at the meeting. This means that if a director did not get notice of the meeting and attends the meeting, he or she cannot later object to the holding of the meeting, unless he or she does so at the meeting itself.

5. Can a board of directors pass resolutions without holding a board meeting if all the members of the board consent in writing?

Unlike the *Business Corporations Act*, R.S.O. 1990, c. B.16, the *Condominium Act*, 1998 does not specifically permit a board of directors to pass resolutions by unanimous written consent. The only exception to this is for the developer board before the turnover meeting is held. In all other circumstances, in order for the directors to pass a resolution, a meeting must be held at which a quorum must be present and vote taken.

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The 2nd edition of "The Condominium Act: A User's Manual", authored by Audrey Loeb, is available from Carswell Publishing. To obtain a copy, please call: (416) 609-3800 or 1-800-387-5164, E-mail orders at carswell.orders@thomson.com; ISBN: 0-459-24273-3; $75.00

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6. Can the members of the board of directors vote to remove a board member?

The simple answer to this question is no. Only the unit owners can vote to remove a board member. The board members can however vote to remove a board member from the office that he or she holds.

THE PRIVATE INVESTIGATORS AND SECURITY GUARDS ACT

The *Private Investigators and Security Guards Act* regulates private investigators, security guards and those selling private investigators and security services. The Act will apply to condominium security guards and concierges and the agencies that supply them. See our Spring 2007 issue of Let's Talk Condo... for more on the new Act.

CONDOMINIUM GOVERNANCE

by
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A board of directors is responsible for governance of the condominium within the confines of the *Condominium Act* and the corporation's declaration, by-laws and rules as well as through the implementation of policies. Boards appoint officers, hire managers, accountants, lawyers and contractors. The directors make decisions on how to spend the corporation's money by setting and approving the annual budgets. They also monitor implementation and have a duty to take reasonable steps to enforce the Act, declaration, by-laws and rules. Board members and officers, with the assistance of management, are responsible for the operations of the condominium corporation. The board is accountable for its actions.

Directors and officers have many duties.They set the parameters within which actions can be taken and decisions made. These duties include management, knowledge, care, skill, prudence and diligence. Directors and officers also have a fiduciary duty and must avoid conflicts of interest and always act within the scope of their authority and in the best interest of the corporation, i.e. the unit owners.

Management – The directors are responsible to manage the property and the assets, if any, of the corporation on behalf of the owners, which includes the day to day operations of the corporation. This includes budgeting, collection of common expenses, hiring and overseeing contractors and employees, proper record keeping, reporting and enforcing the condominiums governing documents. When professional management has been retained, directors need to allow management to do its job. It is not the role of board members to micromanage the day to day affairs of the corporation.

Knowledge – Being familiar with the Act, the declaration, by-laws and rules.

Care, skill, diligence and prudence – Directors must act honestly and in good faith and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Fiduciary duty – A fiduciary is one who stands in a special relation of trust, confidence and/or responsibility in certain obligations to others. A board has this obligation to the owners. The best interests of the corporation ranks over all other interests.

Avoid conflict of interest – A director cannot profit from his/her position at the expense of the corporation. The corporation's interests must come first.

There is nothing inherently wrong with having a conflict of interest. It is a matter of how it is handled. A conflict of interest can include an indirect benefit to others. Section 40 of the Act sets out detailed procedures that must be followed where a director, directly or indirectly, has an interest in a contract or transaction or a proposed contract or transaction to which the corporation is a party.

Act within the scope of authority – Directors must understand the limits on the authority of the corporation, the directors and of management. Directors can be liable if an activity is outside of the scope of the corporation's or the director's personal authority.

Directors must anticipate the consequences of their actions. Directors however will not be found liable for a breach of the standard of care if the board members have acted in good faith upon either,

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- financial statements of the corporation that the auditor, an officer or a manager represents to the director presents fairly the financial position of the corporation in accordance with generally accepted accounting principles.
- a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion.

NOTICES OF LIEN UNDER THE *CONDOMINIUM ACT*

Form 14's – Notices of Lien should be sent out no later than the end of the first week of the third month of arrears. A lien must be registered unless all arrears plus interest and any administration charges are paid before the end of the third month.

FIRST YEAR BUDGET DEFICIENCY - ADD INTEREST

by
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Section 75 of the *Condominium Act* makes the developer responsible to reimburse the condominium corporation for budget overruns in the first year of its operations. The legislature introduced this requirement many years ago, to discourage developers from "low-balling" common expense projections, in order to sell units.

The legislative mechanism is simple: the developer is required to disclose what it will cost the corporation to operate the common elements during the first year. If the costs are greater than predicted, the developer must pay the difference between its prediction and the actual costs incurred.

In theory, all the corporation must do is submit its first year audited statement to the developer, and it is then entitled to received that difference.

In practice, the process is more complicated: if the condominium corporation has changed any service providers, the additional cost may not be recoverable. If a corporation has changed the frequency or duration of a service, (e.g. number of garage washings per year, hours of security per week) the additional cost of the change may not be recoverable. If there are services which the corporation needs during its first year, but which are not provided for in the developer's budget, a dispute will arise as to whether the service was necessary, so that the developer is responsible, notwithstanding the budget.

As well, in practice, some developers simply refuse to pay the budget deficiency in isolation: they want to combine that obligation with their obligation to remedy deficiencies, and bargain for a "global settlement" and a release. Inevitably, agreeing to a "global settlement" means not only that the corporation must compromise both claims, but that the developer pays nothing for many months, even years, after the end of the first year.

A recent decision of Justice Pitt in the Ontario High Court provides corporations with some ammunition in their effort to achieve a timely payment by the developer. The case, *MTCC 1250 et al v Greenberg et al*, dealt with a host of developer issues, one of which was the first year budget deficiency. By the time the case came to trial, six years had passed since the end of the first year.

At trial, the developer admitted that the deficit ($90,000) was owing, and agreed to pay it, with interest under the *Courts of Justice Act*...about 3.5%. The condominium corporation argued that the appropriate interest rate was the rate set out for arrears of common expenses in the corporation's By-law No. 1: in this case, 18%.

The court found in favour of the condominium corporation. The difference, in terms of actual recovery, was almost equal to the principal amount owing - $78,000.

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More importantly, the decision means that developers will have to think carefully before ignoring requests for timely payment of first year deficit claims. Most by-laws provide for interest at much higher than the going rate, compounded monthly. This can quickly add up to a large sum – far more than the developer can hope to earn by investing the money.

Unfortunately, the judge's reasoning in coming to his conclusion that the rate of interest payable is that payable by unit owners for arrears of common expenses, is minimal. Nonetheless, the decision has precedential value. It binds arbitrators, and should be used every time an Ontario condominium mediates the first year budget issue.

SMART METERS IN CONDOMINIUMS NOT MANDATORY

Ontario Regulation 442/07 made under the *Electricity Act, 1998* will come into force on December 31, 2007.

Pursuant to the regulations it will be up to boards of directors of condominium corporations to decide whether to proceed with the *voluntary* installation of smart meters and smart sub-meters. The decision to proceed can be made by the board without the requirement of amending the corporation's declaration.

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