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Let's Talk Condo...

Pages 303 - 306

There's Still Hope for Section 98

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The battle between the rights of individual unit owners to make changes to the common elements and the rights of Condominium Boards to approve such changes in advance continues.

The last decision of consequence on this issue was *Wentworth Condominium Corporation No. 198 v. McMahon*. This was the decision in which the Ontario Court of Appeal found that the installation of a hot tub on exclusive-use common elements in a town house project did not constitute an addition, alteration or improvement within the meaning of s. 98 of the *Condominium Act*.

Recently, changes to the exclusive use common elements of a condominium corporation were considered in a decision of the Ontario Superior Court of Justice. In this case, the unit owner replaced a commercial condominium unit overhead garage door with a wall set with windows. This was an alteration to an "exclusive use" common element area. The permission of the Corporation was not sought nor was it ever granted.

The condominium corporation applied to the court for an order under s. 134 of the *Condominium Act* requiring the unit owner to restore its unit to its original condition.

The Corporation relied on s. 98 of the *Condominium Act* and/or similar provision in its Declaration which requires that unit owners obtain permission from the Board before making any "addition, alteration or improvement" to the common elements.

The court considered the definition of "addition" and "improvement" in *Wentworth Condominium Corporation No. 198 v. McMahon* (the hot tub case) and ruled that the wall set with windows is an "addition" because the wall and windows are "joined to or connected to the property."

The unit owner claimed that, as an "exclusive use" common element, the garage door was not subject to the ordinary application of s. 98. In support, the unit owner argued that the court must strike a balance between

in this issue...

There's Still Hope for Section 98 .....**303**

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Continued from page 303

the rights of the individual and the rights of the owners collectively, as discussed in the *McMahon* decision. The court found that s. 98 is not intended to balance these interests as the wording of the section is clear.

Evidence was lead by the unit owner that the wall and windows addition enhanced the value of the unit. The court reviewed the body of case law on the application of s. 98 and affirmed the principle **that it is immaterial whether an addition is pleasing, attractive, useful, or not unsafe. "Where the elected Board concludes that it [i.e. a change] is unacceptable for an area of common elements, which they are elected to govern, their word is final"**. (*East Gate Essex Condominium Corporation No. 2 v. Kimmerly* [2003] O.J. No. 582).

As an elected body, the Board must administer the condominium in the best interest and welfare of the corporation as a whole. The court should not interfere. However, the court cautioned that "the board members must behave reasonably in exercising its responsibility. In that regard, they are required to keep an open mind with respect to applications [for a change to the common elements]."

Although the court ruled in favor of the Corporation by ordering that the unit owner restore the unit to its original design, it required the Board to consider, in good faith, a new application for retroactive permission for the alterations.

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CONDO TIPS

Condominium corporations must give proper notice to residents before entering units for purposes set out in the *Condominium Act* and the corporation's governing documents. The notice must be in writing and the timing must be "reasonable". This will depend on the circumstances. For example, the corporation may enter a unit without notice when there is an emergency. Otherwise the notice must be delivered to an owner and/or occupant either: (a) personally; (b) by mail; (c) by fax, email or other method of electronic communication; and/or (d) to the owner's unit or the mail box for the unit. Refer to subsection 47(7) of the *Act* for more details. The posting of notices on common element bulletin boards, for example, will not constitute proper service, even if it is for regular annual maintenance.

As a number of recent TV shows on hoarding illustrate, this is a serious and widespread problem and can be very difficult to deal with. For the safety and comfort of all residents, make sure your condominium corporation has passed a rule prohibiting hoarding. Please give us a call for assistance in preparing an appropriate rule.

If a condominium corporation wishes to add any costs and expenditures to a unit owner's common expenses (i.e. chargebacks, etc.), it must consider the following: First, it is necessary to determine whether the chargeback is permitted under the governing documents and/or the *Condominium Act*. Second, the corporation must advise the owner in writing that the chargeback has been added to the owner's common expenses and the corporation must specify a reasonable deadline for payment of the chargeback. Third, if payment is not received by that specified deadline, that will constitute a default in the owner's obligation to pay common expenses and the corporation will have 3 months from that date to register a certificate of lien in accordance with the *Act*.

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Cover Your Assessment

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Condominium unit owners have ownership interests in their units together with an undivided interest in the common elements. These common elements generally include, but are not limited to, the lobbies, hallways, recreational rooms and parking garages of the condominium. In accordance with the *Condominium Act, 1998* (the "Act") unit owners are required to contribute to common expenses. A portion of the common expenses collected is used to pay for such things as security, management, maintenance and the repair of these common elements. Another portion is deposited into the corporation's reserve fund, in accordance with the *Act*.

Condominium corporations are required to establish reserve funds to ensure an appropriate amount of money is put aside for the purposes of carrying out major repairs or replacements of the common elements and assets of the corporation. If the amounts in a reserve fund are inadequate to meet the expenditures required, the board of directors may need to levy a special assessment and unit owners will be responsible for their share of the assessment.

There are occasionally instances where unit owners may have recourse to an insurer to cover their share of the assessment. Some examples of these occasions are discussed below.

Most real estate lawyers will recommend that purchasers buy title insurance when purchasing a condominium unit. Title insurance is intended to offer purchasers protection against a number of factors, including special assessments that may not have been disclosed in the Status Certificate.

We have all heard the story of purchasers being faced with a special assessment after they completed the purchase of their unit. Even though the corporation was aware that a special assessment might be levied or was aware of circumstances that might result in the need for a special assessment in the near future, this information was not disclosed in the Status Certificate. In these circumstances, title insurance should compensate the purchasers for their portion of any special assessment levied.

There are other circumstances where an insurer may be responsible for an owner's share of a special assessment. A unit owner may have coverage for a special assessment as part of the owner's insurance policy. This coverage will benefit a unit owner in circumstances where a condominium corporation suffers an insured loss, the insurance proceeds are inadequate to cover the costs, and the corporation levies a special assessment for the difference. This would only occur in very unusual circumstances.

An example would be the case of a condominium corporation that incurred environmental clean-up costs because of a heating oil leak into the common elements. The town home units in this condominium had oil tanks that were buried in the common elements and which serviced each individual unit's furnace. Pipes ran through the concrete basement floors of the units from the heaters to the oil tanks. As a result of a pipe break, oil seeped into the ground and the resulting environmental clean-up cost was over $300,000.

Over the years several of these pipes had broken and the corporation had taken out the maximum available environmental coverage in the amount of $10,000.00. The remainder of the clean-up cost was paid for by way of a special assessment. Unfortunately, when this happened, no one considered whether the unit owners' insurance policies included special assessment coverage. When this enquiry was finally recommended, the deadline for making a claim had long passed. As it turned out, all but one of the unit owners had special assessment coverage and had the right advice been given, then unit owners' insurers would have paid their proportionate shares of the special assessment.

Continued on page 306

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Continued from page 305

The above-noted scenario highlights an important point of which all unit owners should be aware. If the corporation suffers an insured loss, and if it does not have adequate insurance to cover the resulting damage, it may levy a special assessment to cover the costs. Unit owners who have special assessment insurance coverage, as part of their unit owners' insurance policy, will be entitled to claim their portions of the special assessment from their insurers.

It is important to note that special assessment insurance only applies in circumstances where the loss itself is insured, the corporation's insurance coverage does not adequately cover the loss, and a special assessment is levied to pay for the costs. Although these circumstances are uncommon, we strongly recommend that all unit owners contact their insurers to ensure that they have special assessment insurance coverage. The cost is minimal; the benefits could be significant.

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