

Let's Talk Condo...

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SMOKE FREE ONTARIO ACT

Announcements:

Don't forget to mark your calendars:

The Toronto Condo Show, November 10 – 12, 2006 at the Metro Toronto Convention Centre. –A consumer show designed for condo purchasers, owners, sales agents, and building managers.

Miller Thomson's condo practice group, ACMO, CCI and others will be participating and speaking on many different condo topics.



by
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We have received numerous inquiries from condominium corporations inquiring as to how the *Smoke Free Ontario Act*, which recently came into force in Ontario, affects condominiums and whether smoking is now prohibited on exclusive use common elements balconies, on terraces and under awnings or canopies.

Section 9(1) of the Act provides that “no person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed work place”.

An enclosed public place is defined to mean “the inside of any place, building or structure or vehicle or conveyance or a part of any of them, (i) that is covered by a roof, and (ii) to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry, or be a prescribed place”.

A roof is defined to mean “a physical barrier of any size whether temporary or permanent, that covers an area or place or any part of an area or place and that is capable of excluding rain or impeded airflow or both”.

Pursuant to the Act, smoking under a canopy, such as a lobby entrance canopy, does not constitute smoking “inside of any place, building or structure or vehicle or conveyance or part of any of them”.

However, in accordance with section 14 of Ontario Regulation 48/06, a place or area to which the public is ordinarily invited or permitted access, that has a roof and more than two walls, and is not primarily a private dwelling, is a prescribed place in which smoking is prohibited.

A wall is defined to mean “a physical barrier of any size capable of excluding rain or capable of impeding airflow or both, including a movable or temporary barrier”. Therefore where the public is ordinarily invited or permitted access, smoking is prohibited under any canopy or awning that is attached to 2 or more walls.

There seems to be a lot of confusion with respect to awnings and canopies because of the restrictions in relation to bar and restaurant patios. Ontario Regulation No. 48/06, Section 13, deals with patios and prohibits smoking in most bar and restaurant patios. This is because patios are “prescribed places” in which smoking is prohibited where:

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We are pleased to announce that the 2nd edition of “The Condominium Act: A User’s Manual”, authored by Audrey Loeb, is now 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

1. the public is ordinarily invited or permitted access or the place or area is worked in or frequented by employees during the course of their employment;
2. the place or area has a roof;
3. food or drink is served or sold or offered for consumption in a place or area, or the place or area is part of or operating in conjunction with a place or area where food or drink served or sold or offered; and
4. the place or area is not a primary dwelling unit.

This however does not apply to a condominium corporation.

Section 9(2) of the Act provides that no person shall smoke or hold lighted tobacco in any common area in a condominium, apartment building or university or college residence, including, without being limited to, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas or in a prescribed place or area.

Although section 9(2) prohibits smoking in any common area in a condominium, this is not a prohibition on smoking anywhere on the common elements of a

condominium corporation. The prohibition deals with common areas that are inside a condominium, such as elevators, lobbies, hallways, stairwells and party rooms. A common area may also include a unit such as a shared facilities unit, which is owned by one or more condominium corporations. An exclusive use common element balcony or terrace, however, is not a common area to which the public ordinarily is invited or is permitted access. Therefore the *Smoke Free Ontario Act* does not prohibit smoking on exclusive use common element balconies or terraces.

Although the *Smoke Free Ontario Act* does not prohibit smoking in all portions of the common elements of a condominium, a condominium may pass rules in accordance with the *Condominium Act*, which prohibits smoking on common elements. The corporation likely does not have the authority to prohibit smoking on exclusive use common element balconies. Most corporations however do have rules that prohibit residents and their guests from causing a nuisance or disturbance to other residents, which a corporation may be able to rely on where smoking on a balcony or terrace is causing a nuisance or a disturbance upon the residents.

GST



by
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A recent request from one of our client condominium corporations has brought to light a practice in commercial and combined commercial-residential condominiums which we believe is incorrect. Our client is a condominium corporation that contains residential, commercial and live-work units.

All condominium corporations currently, as part of the monthly common expense fees, include the G.S.T. that is payable on the goods and services supplied to the condominium. In addition, in commercial and mixed use buildings, the unit owners pay 6% G.S.T. on top of the monthly amount of common expenses. The corporation is registered for G.S.T., files G.S.T. returns and takes the input tax credit (ITC).

The consequence of this arrangement is that the owners are paying twice. In addition to paying G.S.T. as a component of the common expenses they are paying an additional 6% G.S.T. on the monthly common expense. Therefore if a unit is paying \$400/month in common expenses, part of that \$400 includes G.S.T. paid on goods and services supplied to the corporation and they are paying an additional 6% G.S.T. on the \$400.

There is a recent decision, *Condominium Plan No. 9422336 v. R. [2004], G.S.T.C 351*, which concerns a commercial condominium corporation, and essentially deals with the issue at hand. In this decision the Court found that the condominium corporation incurred all expenses as agent of the owners because it met the common law test of agency and it was a not-for-profit entity that was not “engaged in a commercial activity”. This case stands for the position that, since the corporation does not add any fees of its own for supplying the services to the unit owners, it acts as agent of the unit owners.

Therefore since condominium corporations do not charge a fee for their services of organizing or acting as agent for the owners, they are not-for-profit vehicles for the flow-through of expenses. Based on this decision, and the corporation's role as agent of the owners, for all the goods and services provided to the corporation, condominium corporations should not be collecting G.S.T. on the common expenses, nor filing returns and taking the ITC.

We recommend that condominium corporations stop charging the 6% G.S.T. on common expenses, paid by the unit owners, and filing G.S.T. returns. Before doing this, however, each corporation will need to discuss how to deregister with its auditor to make sure that the appropriate paper work is filed with the Canada Revenue Agency (CRA). Once the necessary arrangements are in place with the CRA the corporations should prepare the necessary paperwork

to allow the individual unit owners, who are entitled to take the ITC, to do so.

To facilitate this change in handling G.S.T., corporations should prepare a list of all the suppliers to whom it pays invoices with G.S.T., together with their G.S.T. registration numbers. They should then calculate the total amount of G.S.T. paid by the corporation and provide that information together with the names and G.S.T. numbers of suppliers to the non residential unit owners so that they can take an ITC, if the nature of their business allows for that (that is, if the unit owners are involved in commercial activities for G.S.T. purposes).

Those persons who occupy live-work units and use a portion of their premises for commercial purposes will have to determine the ITC based on the square footage of their units that is devoted to commercial use.

THE AMENITIES



by
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Do you really need those amenities in your condo? Are they worth the maintenance and cost? Are they used by unit owners?

Many unit owners buy into certain condominiums because of the amenities. The reality is that amenities that sometimes sound so appealing - often go unused and whereas those important items, such as - adequate storage lockers - are under appreciated and may be overlooked altogether.

John Oakes, President of Brookfield Residential Services in Toronto performed an informal survey of the properties Brookfield manages and the results, which were presented at a recent Greater Toronto Home Builders seminar, are instructive. Let's start with some of the obvious ones. It probably doesn't come as much of a surprise that exercise rooms, followed by swimming pools, are the two most common amenities. But it's interesting to learn that

they are also the two most used amenities. However, it seems that those facilities are not sufficiently large enough to serve many buildings. Particular attention should be paid to the types and amount of equipment available in exercise rooms. John Oakes' survey indicated that treadmills, elliptical trainers, exercise bikes and free weights are the most popular choices in exercise equipment among residents and should be commercial grade.

Of course amenities do impact on common expenses and that while exercise rooms are among the least expensive amenities to maintain (assuming good commercial grade equipment is used), swimming pools are among the most expensive.

The surprises? We all love the idea of tennis courts but experience shows they are underused, expensive to maintain and a potential security issue because of their appeal as a gathering place for teenagers and others. Saunas are very common but are significantly underused, perhaps in large part to their high operating cost. To save on electricity, the saunas are often turned off when not in use, meaning a resident will have to wait a long time for the sauna to warm up. Common area barbeques? They are popular with residents and heavily used but keeping them clean

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and in good working order can be a lot of work.

What do people enjoy the most or wish they had more of? Nothing fancy here, just the tried and true favorites and some more practical items. Guest suites for overnight stays remain very popular (although often too small), as do billiard rooms, multi-purpose rooms and theatre rooms where residents can enjoy movies with their family, friends or other residents. Business centers may sound boring but they rank surprisingly high on the list of heavily used amenities. "Hot spots" providing wireless internet connectivity are increasingly popular. Ditto for car wash bays. Bicycle storage? Many existing buildings are reporting that demand far exceeds supply. Where are the bike racks or lockers actually located? How easy are they to get to? How secure are they? These are important factors for many residents.

There are also workshops, golf simulators and libraries. All have their virtues and may appeal to a certain cross-section of the residents but aren't used heavily in practice.

Although John Oakes's survey, seemed to imply that whirlpools were not heavily used, Jim Ritchie, Senior Vice-President of Sales and Marketing for Tridel, says that whirlpools remain very popular with prospective purchasers. As a result, they tend to get included in most new construction.

Think about your amenities, the costs involved and what residents use and enjoy. It may be time to revisit changes and consider alterations to benefit the Corporation.

Tune in to MondoCondo tv on October 14 at 9:00 and 9:30 am on CHCH and Prime and October 22 at 12:00 noon on Global for the first episode of MondoCondo. Hosted by Denise Lash, MondoCondo will explore all aspects of condo living.

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LOOKING AT LAW FROM YOUR PERSPECTIVE

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