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Barristers & Solicitors, Patent & Trade Mark Agents
CANADA'S LEADING CONDOMINIUM LAW PRACTICE

Let's Talk Condo...

Fall 2003
Pages 191-194

ANNOUNCEMENTS

Miller Thomson will be a Gold Sponsor at the upcoming ACMO/CCI conference scheduled for November 7th and 8th, 2003. All of our lawyers will be participating in this very exciting conference. Mark these dates on your calendar.

OUR READERS TALK

In upcoming issues of Let's Talk Condo..., we will be introducing a new column: "Our Readers Talk". This is a column written by you and dedicated to news of what's happening in "Condo land". What's happening? What's new? Who is on the move? Let us know. E-mail or fax all your good news to any of the members of our Condominium Practice Group. We will do our best to include your contributions.

in this issue...

Unanticipated Reserve Fund Expenditures....191
Life After The New By-laws 192
Enforcement of Rules, Not Policies....193
A Quick Note on Notice to Owners of Legal Claims 193

UNANTICIPATED RESERVE FUND EXPENDITURES

by
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A recent case in Alberta sets out for Board members their obligations with respect to the reserve fund when repairs, not contemplated in the reserve fund study, are necessary. The condominium corporation commissioned a reserve fund study but repairs were required sooner than anticipated and there were insufficient funds in the reserve fund to cover the costs. When the expenditure was challenged by a group of owners the question that the Court had to decide was whether this expenditure from the reserve fund constituted a capital improvement which would require a vote of owners, or whether it was an appropriate expenditure from the reserve fund notwithstanding that it had not been budgeted for at the time that the repair was necessary.

The judge distinguished a capital improvement from a repair by suggesting that a condominium corporation which did not have an elevator and wished to install one would be looking at a capital improvement, however if the corporation had an elevator and it was in need of repair then it would constitute a repair.

He stated, "There can obviously be a grey area between capital improvements and repairs. For example, if the condominium corporation was to replace existing windows because they were worn out, but were to replace them with much larger patio doors, that might arguably be a capital improvement or it might simply be regarded as a repair.

The *Act* draws a clear distinction between repairs and improvements. An unanticipated or accelerated or over-budget repair is still a repair. Such items do not become capital improvements within the scheme of the *Act*.

The next question is then the consequences of there being an unexpected expenditure from the reserve fund. One possible interpretation of the *Act* is that the corporation is not permitted to make any expenditure from the reserve fund unless that expenditure is anticipated in the reserve fund study and the reserve fund plan. In my view, this is not the correct interpretation of the *Act*. Preparing a reserve fund plan that projects many years into the future is always going to be a bit of a guessing game. The exact timing of the expenditure and the exact quantum of the

Continued on page 192

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Continued from page 191

expenditure will always be an estimate only. That the estimate will not always be accurate is obvious.

In this case, for example, the roof was scheduled to be replaced in 2002, but the owners have managed to squeeze a few extra years out of it and that expenditure has not yet been made. There will be other cases where unexpected expenditures arise.

In my view, the condominium corporation can spend the reserve fund on major repairs, even if they were completely unexpected and unanticipated...Expenditures of this nature from the fund are in the hands of the Board."

The next question the Court had to decide was what happens if an unexpected expenditure must be made from the fund and that results in a deficit position for the fund. The judge found that the Board had an obligation to revisit the reserve fund plan and make any necessary adjustments to the reserve fund levy to accommodate such an unexpected expenditure. The Court did go on to say that the statutory requirement for carrying out reserve fund studies is a minimum requirement only. He stated that if it becomes apparent that the initial reserve fund study is defective in some respects that the Board has an obligation to re-examine the reserve fund study before the required statutory review.

LIFE AFTER THE NEW BY-LAWS

by

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Many corporations are now passing new by-laws. These new by-laws include occupancy standards by-laws, mediation and arbitration by-laws and standard unit by-laws.

Once new by-laws have been confirmed by the unit owners and registered, the board and management should be taking steps to notify the owners by highlighting the important areas and explaining what it all means.

Occupancy Standards By-law

This by-law may have been incorporated into your corporation's general operating by-law.

The board should be putting into place a formula to determine what the charges will be in the event that the number of occupants in a unit exceeds the occupancy standards set out in the by-law. The corporation is entitled to surcharge a unit an amount that reasonably reflects the increased costs to the corporation where a person contravenes the standards for the occupancy of a unit set out in the by-law.

The Board should be notifying owners as to the number of occupants that are permitted and should determine how to treat short term visitors and guests. For example, after how much time will the board consider visitors or guests to be occupants?

The board may also want to determine how the occupancy standards will apply to children and develop a policy to determine whether children should be considered "persons" for purposes of the by-law.

Standard Unit By-law

It is very important that the board and management advise owners as to their insurance obligations. The standard unit by-law defines what is part of the standard unit and this definition is used to determine what the corporation's insurance obligations are with respect to the unit. All other items which are within the unit boundaries which are not common elements and are not part of the standard unit are considered improvements and are the unit owners' obligation to insure. If the unit owner does not get insurance to cover these improvements, then the unit owner may be at a loss in the event of damage to the unit.

Recently we were involved in an incident in which there was damage caused by a flood to the parquet flooring in the kitchen of a unit. This was not defined as part of the standard unit and was therefore an improvement. The unit owner did not have insurance for this and as a result, suffered the loss and had to pay for the costs of reinstalling the parquet flooring.

The board and management should be advising owners to review the standard unit by-law and to obtain insurance coverage for items that are within their units and are not listed in the standard unit by-law. Owners should be contacting their insurers once the standard unit by-law is in place and should be sending a copy of it to their insurers.

Mediation and Arbitration By-law

Owners should be aware of the process that is in place to resolve disputes. Our mediation and arbitration by-law has forms attached to it that may be used by both parties to a dispute so that it can be dealt with quickly without confusion as to what is involved in the process. Copies of the forms should be made available to residents at the management office.

Enforcement of Rules, Not Policies

by
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Rules assist in governing the day to day life of a condominium community. The *Condominium Act, 1998* (the "*Act*") allows for rules to be established by a board of directors to promote the safety, security or welfare of the owners and of the property and assets of the corporation and also to prevent the unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation. It is important for boards to review their existing rules to consider how relevant the rules are and to make the necessary changes. Although there is sometimes a desire to deal with matters in by-laws that are properly dealt with in rules, rules are just as enforceable as by-law provisions. Policies however are not enforceable.

The governing documentation of a condominium corporation, pursuant to the *Act*, includes a declaration, by-laws and rules, but not policies. A corporation has the duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and the employees of the corporation comply with the *Act*, the declaration, the by-laws and the rules of the corporation.

The *Act* provides specific procedures for making, amending and where necessary, registering these documents. There is no mechanism provided for making policies. Many boards of directors have made policies that cover a range of matters. Corporations can not compel compliance with policies. It is important to review all policies and determine whether they should be passed as rules. If the corporation wants to be in a position to enforce a policy, it must be passed as a rule.

To pass new or amended rules, notice of the new or amended rules must be given to the owners who are given 30 days to requisition a meeting of owners. Otherwise the rules are effective after the 30 days. If a requisitioned meeting is called, the proposed rules must be approved by a vote of the owners before the rules become effective. Owners also have the right to requisition meetings to amend or repeal rules.

Boards should review their corporation's rules and policies, if any. Many rules may be outdated. Some important rules may be missing altogether. Consider these questions when reviewing your rules: Are all the rules still appropriate or relevant? Can new specific rules be useful (parking, leasing, pets…)? Will it be necessary to "grandfather" those who complied before the new rule but will no longer? Are there some rules that are not enforced, but should be? Are there some rules that should be repealed?

Reviewing and updating the rules can be a time consuming task. But it is important to take the steps now to ensure that, for those situations where it is needed, the right rules are in place and enforceable.

Quick Tip

Considering setting up a website for your condominium corporation? Get legal advice first: There are trademark, copyright and Privacy Act issues which need to be addressed.

A Quick Note on Notice to Owners of Legal Claims

Section 23 of the *Condominium Act, 1998* requires a corporation to give notice to unit owners before commencing, maintaining or settling a claim for damages and costs in respect of any damage to the common elements, the assets of the corporation or individual units, or with respect to contracts relating to any of them.

In *Corchis v. Essex Condominium Corporation No. 28 (C.A.)*, the corporation was sued over a leaking roof and the corporation in turn sued the roofing contractor for whatever amount the corporation had to pay to the unit owner. The claim against the roofing contractor was held to be a claim for contribution and indemnity and not a claim for damages. Notice did not have to be given to the unit owners under the *Act*.

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Let's Talk Condo is published quarterly by the full service law firm of MILLER THOMSON LLP. By practising within a full service firm, we are able to match the diverse legal needs of today's condominium corporations with the tremendous depth of legal resources offered by MILLER THOMSON LLP's lawyers in other areas of the law including municipal and planning work, employment, labour and human relations, construction contracts and deficiencies, human rights matters, insurance matters and civil litigation.

To obtain copies of earlier issues, or to have yourself added to our mailing list, please contact Betty Dworatschek at 416.595.2968.

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WEEKEND TO END BREAST CANCER - $12 MILLION RAISED

Miller Thomson LLP congratulates Audrey Loeb, who is a member of the board of directors of the Princess Margaret Hospital and was instrumental in organizing the 2-day 60 KM walk in support of a search for a cure for breast cancer. The Weekend To End Breast Cancer took place on September 20 and 21 and raised $12 million. This was the most successful first time fund raising event in Canadian history. For more information please go to www.endcancer.ca

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We have offices in Toronto, Markham and the Waterloo Region to better serve your needs.

In addition to our condominium expertise, our firm has experts in all legal areas including employment, construction, planning, insurance and environmental law, all of whom are available to support our clients' needs in an informative, timely and cost-effective manner.

E-MAIL ANNOUNCEMENT

We can now send you, Boards and Property Managers Let's Talk Condo... via-e-mail.
Please provide by e-mail, addresses of those persons who you want to receive our quarterly issues to bdworats@millerthomson.ca or fax to 416.595.8695
Attention: Betty Dworatschek

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We welcome your questions, comments and suggestions.
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