



## FEATURES THIS MONTH

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## 1. CONTINGENCY RESERVE FUND: CAN YOU EVER HAVE ENOUGH MONEY?

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Section 94 of the Strata Property Act states:

### 94 Depreciation report

- (1) *The strata corporation may prepare a depreciation report estimating the repair and replacement cost for major items in the strata corporation and the expected life of those items to assist it in determining the appropriate amount for the annual contribution to the contingency reserve fund.*
- (2) *A depreciation report may contain information based on the guidelines for depreciation reports as set out in the regulations and may be in the prescribed form.*

VCS manages 200 strata corporations and less than a half dozen stratas have embarked on the development of a depreciation report. This is not surprising and it has nothing to do with the cost of obtaining such a report, which could be between \$3,000 and \$10,000 depending on the size and complexity of the specific property. The real issue is the word "may". As long as the Act is permissive rather than mandatory, there is nothing to force the owners of strata corporations to undertake such a review of the long-term requirements of their properties. In Ontario, by contrast, the development of reserves is mandated by their statute. It is detailed and meaningful, and the Boards of Directors (strata councils) can force the owners to consider and fund the future expenses of their properties. Legislation with teeth it is called, and we do not have it here in B.C., which is lamentable. It is our experience that our strata councils would love to develop long-range reviews backed with a revenue process but that is an impossible task because, at Annual General Meetings, the owners simply demand bare-bones budgets and "to hell with the future - that's someone else's problem!"

We cannot turn around such attitudes given the legislative difficulties; however, we do bring to your attention a new booklet published by the Canadian Condominium Institute (CCI). It is an excellent outline of how reserve studies should be conducted and it also contains a summary of legislation across Canada (compiled in part by VCS). The booklet contains models of how reserve fund studies should be done.

If you are interested in obtaining a copy, at \$20 plus GST, please advise your strata agent and we will order one for you.

## 2. CONSIDER YOURSELF LUCKY - AT LEAST FOR NOW

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Do you recognize these very common bylaws?

“An owner, tenant, occupant, guest or visitor shall not feed from any strata lot or common property seagulls, pigeons, crows or other birds.”

“No owner, resident or visitor shall store birdseed, peanuts or other foodstuffs on their open balconies or patios which might attract birds or animals.”

The answer is probably “yes”. These bylaws, or variations of them, are extremely common in strata corporations and they are there as a means to prevent residents from creating situations which are offensive to other residents. In particular, the feeding of birds invariably results in volumes of bird poop spraying down on other people’s balconies, patios or their heads! Not pleasant to be sure.

Fortunately, common sense and the presence of such bylaws or rules generally eliminates the problem; however, in most strata corporations there are usually one or two people who do not feel restrained by these concepts. They simply do what they want. Should the strata council make its best efforts to enforce the bylaw and, if so, at what cost? In the overall scheme of things is it a big deal that an owner feeds the birds? If it is, how far does the council go in bringing about compliance, and how is that done?

Take the case of one Vancouver strata corporation that experienced such a problem. An owner in a highrise building had been, for many years, feeding the birds from her balcony. She also kept a large supply of peanuts and other “foodstuffs” on her balcony allegedly for feeding squirrels in a nearby park area. A series of letters was sent to the owner asking for compliance with the bylaw; however, this approach had no effect. Eventually, the strata council initiated arbitration proceedings in order to force compliance. (For those of you who have read VCS bulletins over the years, you will know that VCS never recommends arbitration. VCS always recommends the traditional approach, i.e., an application to the B.C. Supreme Court.)

In any event, in this case the strata council (not a VCS client at the time of the arbitration) proceeded with arbitration and won. Good news, right? Maybe.

The cost of the arbitration was about \$20,000 for the strata corporation, which was awarded to the strata corporation. The legal fees for the strata corporation came to about \$140,000 of which three-quarters was awarded - the strata had to fund the remaining \$35,000. The strata corporation was also awarded judgment of some, not all, of the fines it had levied on the owner. The process took about three years and the transcript of the arbitration hearing ran over 1,000 pages; there were over 100 exhibits.

All this because an owner fed birds from her balcony. Was it worth it? If not, could the strata corporation have simply condoned the actions of the owner? The battle is not over. The owner plans to appeal the judgment to the Supreme Court.

In another strata corporation an arbitration ensued over what most strata councils would consider immaterial breaches of their actions as council members. The owner in this case insisted on a zero-tolerance approach to the administration of the strata corporation pursuant to every word of

the Strata Property Act. Few, if any, strata corporations and councils comply literally 100% with the statute and, in this case, the strata corporation lost their case, the arbitrator finding himself with no room to move, meaning that he had to agree with the owner who insisted on 100% compliance with the statute. The cost to the strata corporation was about \$50,000 and, again, the battle continues. The owner is still there and relentlessly and mercilessly pursues the strata council issue after issue. It is only a matter of time before there will be another arbitration.

So, what is the message here? Should you administer your strata corporation in strict (100%) compliance with the Strata Property Act and your bylaws? Should there be some measure of flexibility and, if so, how much? These are difficult questions to answer. We can tell you that, in the many cases we see, aside from the two cases cited in this article, the conduct and approach of the strata councils is paramount. It is a volunteer job for which you get paid nothing. You get a lot of grief and, in fact, you are often subjected to personal hostility from one or more owners. Comply with the Act as much as you can, do not be in a rush to levy fines, do not make such events a personal vendetta, do not make exceptions (as in Joe is a nice guy, we will look the other way - Harry is an idiot, let's nail him) and finally always provide ample opportunity for an owner who is alleged to have done something wrong to have a hearing. The Act requires that an owner be given certain rights. Section 135 says:

### **135 Complaint, right to answer and notice of decision**

- (1) *The strata corporation must not*
  - (a) *impose a fine against a person,*
  - (b) *require a person to pay the costs of remedying a contravention, or*
  - (c) *deny a person the use of a recreational facility*

*for a contravention of a bylaw or rule unless the strata corporation has*

  - (d) *received a complaint about the contravention,*
  - (e) *given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and*
  - (f) *if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.*
- (2) *The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).*
- (3) *Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.*

Make sure you comply with this provision. We hate to harp on this point, but we routinely witness strata councils ignoring this very important provision of the Act. At council meetings it is common to hear council discuss owner bylaw violations with the discussion ending with instructions to the strata agent "Levy a fine of \$50 on him...". VCS even gets e-mails and telephone calls from councils with such instructions - we are happy to oblige but you must remember the law. And finally, after observing the two cases referred to in this bulletin, consider yourself lucky...for now.

### 3. MY CONDO IS MY CASTLE

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Monday, November 17, 2003  
West End, Vancouver

**Robert, the resident caretaker, has Mondays off**, and was shopping at an auction facility in False Creek. He carries his cell phone just in case of emergencies. It rang, and when he answered, he was advised that it was the Vancouver Police Department. "Where was he?" he was asked and would he please wait on the street for a squad car to pick him up.

Moments later, a police car screeched to a halt, lights and siren going full tilt. Robert was hustled into the back seat, his heart pounding. "Why?" he asked. No answer. He was driven back to his building in the West End, lights and siren blazing. There were at least nine or ten squad cars out front, plenty of cops walking around in full body armour, and police sharpshooters on roofs of adjoining buildings - all reminiscent of an action movie.

The police wanted access to a particular strata lot and, although prepared to knock the door down with one of those two-person battering logs, they preferred that Robert use his master key. In they went to find a nice collection of guns and other suspicious criminal evidence. Seconds later, a police supervisor entered and, addressed the dozen cops in the apartment "Who's got the warrant?" Silence.

"Oh oh", for the cops and perhaps "oh oh" for the strata corporation.

Although some strata corporations have deleted the standard bylaws of the *Strata Property Act*, most have retained them. (These bylaws automatically replaced the standard bylaws of the previous *Condominium Act*.) The discussion in this article pertains to bylaw 7 which deals with access to strata lots. It states:

***Permit entry to strata lot***

- 7** (1) *An owner, tenant, occupant or visitor must allow a person authorized by the strata corporation to enter the strata lot*
- (a) *in an emergency, without notice, to ensure safety or prevent significant loss or damage, and*
  - (b) *at a reasonable time, on 48 hours' written notice, to inspect, repair or maintain common property, common assets and any portions of a strata lot that are the responsibility of the strata corporation to repair and maintain under these bylaws or insure under section 149 of the Act.*
- (2) *The notice referred to in subsection (1) (b) must include the date and approximate time of entry, and the reason for entry.*

When a caretaker or council member opens a door for the police, are they relying on this bylaw or are they just too intimidated to do anything else, such as refuse? We have commented on this bylaw in the past, and its concept and objectives continue to haunt us. VCS regularly, on behalf of its strata corporation clients, authorizes access to strata lots although at all times it is done pursuant to subsection (1)(a) to deal with emergencies such as fires, water leaks, and, uh, "strange odours".

The part of this bylaw that puzzles us is subsection (1)(b). Notice that the strata corporation has an uncontestable right to gain access to a strata lot and the owners, tenant, occupant or visitor must cooperate! Granted, the bylaw states very specific reasons that the strata corporation has to meet in order to demand access; nevertheless, the reasons cited are broad enough to give considerable latitude to the strata council. We also concede that it is rare to see strata councils rely on this bylaw; however, with the ever increasing proliferation of drug labs and grow ops, councils are proactively scratching their chins to think of ways to prevent these types of activities. The problem is, however, whether or not reliance on bylaw 7 is a valid application for this objective. We have our doubts and suggest that it will be up to a court one day to make a ruling. We have done some research on what other authorities and jurisdictions rely on to gain access to residences and we offer the following observations for your review.

In situations where police officers, firemen or others wish to enter a strata lot without the permission of the owner or occupant, consider the following. Generally speaking, a search warrant is a prerequisite. A strata corporation bylaw cannot change that fact. In other words, bylaws are subject to all laws of general application. So, any strata corporation bylaw that contravenes the federal *Bill of Rights*, the B.C. *Human Rights Code*, the B.C. *Residential Tenancy Act*, the federal *Charter of Rights*, the *Criminal Code*, etc. is void and unenforceable (see section 121(1) of the SPA).

There are some exceptions to the general requirement that a search warrant would be needed before a person's condo can be entered without the consent of the occupant. Among them are these:

### Criminal Law

The *Criminal Code* allows a "peace officer" (which includes police officers, prison guards, sheriffs, customs officers and fisheries officers, among others) to enter a residence without a search warrant to arrest or apprehend a person or to search and seize evidence, if the conditions for obtaining a warrant exist but by reason of "exigent circumstances" it would be impracticable to obtain a warrant. Exigent circumstances include a situation in which a peace officer has reasonable grounds to believe that evidence relating to the commission of an indictable offence (which includes pretty much all but the least serious of offences; therefore, of course, includes running a grow op or drug lab) is present in the residence and that entry into the residence is necessary to prevent imminent loss or imminent destruction of the evidence.

In most cases there will be no evidence to convincingly suggest that the grow op or drug lab will suddenly disappear if the police were to take the time to go and get a search warrant. In other words, in most grow op situations the police should have a search warrant before entering, and strata councils (and their employees) should ask them to produce one before agreeing to open the door (unless one of the exceptions outlined here applies). Fire inspectors are less restricted, and are, therefore, more likely to be the ones with the authority to enter in the absence of a warrant or invitation (see below). It is our understanding that, in practice, the police often get fire inspectors to accompany them to a suspected grow op or drug lab in order to gain entry without having to go through the process of obtaining a search warrant.

The *Criminal Code* also allows a peace officer to enter a residence without a warrant, by force if necessary, to prevent the commission of a crime which would cause immediate and serious injury to any person, if he/she believes on reasonable and probable grounds that such an offence is about to be committed.



A peace officer can also enter a residence without a warrant in order to discharge his/her common law duty to preserve life (i.e., where the police receive a 911 call that a person is in danger of death or bodily harm).

### **Fire Services Act**

The fire commissioner and the commissioner's inspectors have authority at all times, day or night, to enter and examine a building or premises (i.e., a residence) where a fire has occurred, and, if necessary, those premises adjoining or near the fire (section 10(1)).

On complaint of a person interested or, if believed advisable without complaint, the fire commissioner and the commissioner's inspectors may at all reasonable hours enter any premises anywhere in British Columbia to inspect them and ascertain whether or not any of the following conditions exist:

- (a) the premises are in such a state of disrepair that a fire starting in them might spread rapidly to endanger life or other property;
- (b) the premises are so used or occupied that fire would endanger life or property;
- (c) combustible or explosive material is kept or other flammable conditions exist on the premises so as to endanger life or property;
- (d) a fire hazard exists on the premises (section 21).

If an emergency arising from a fire hazard or from a risk of explosion causes the fire commissioner to be apprehensive of imminent and serious danger to life or property, or of a panic, the fire commissioner may immediately take the steps he or she thinks advisable to remove the hazard or risk (section 25(1)).

In each of the above situations, entry into a private residence without a search warrant or invitation would be among the options available to the fire inspector.

### **Gas Safety Act and Electrical Safety Act**

Municipal gas and electrical inspectors are authorized to enter any premises at all reasonable hours in the performance of their duties (*Gas Safety Act*, s. 10; *Electrical Safety Act*, s. 11(a)). In practice, if someone is residing in the unit, a gas or electrical inspector would rarely enter without first getting permission. If there is a reasonably perceived emergency, they might do so, but presumably would then want to be accompanied by the police or fire department. If the unit is unoccupied, where for example it is being used for a grow op, it seems that they are more willing to enter simply on the invitation of the strata council.

### **City of Vancouver**

(Presumably, similar bylaws also exist in all neighbouring municipalities.)

- (a) Electrical Inspectors. Section 313 of the *Vancouver Charter* provides that "the City Electrician, or any person authorized by him, may enter any building or premises at any reasonable time for the purpose of inspecting and testing any wiring, appliance,

equipment, conduit, or apparatus used or designed, or intended for use, for or in connection with the generation, transmission, supply, distribution, or employment of electrical energy for any purpose." (Paragraph 6.1(a) of Electrical Bylaw No. 5563 mirrors this language.)

- (b) Building Inspectors. Paragraph 1A.6.1.1 of Building Bylaw No. 8057 (1999) provides that "the Chief Building Official, and any person authorized to act on behalf of the Chief Building Official, may enter any building or premises at any reasonable time for the purpose of administering or enforcing this Bylaw, or if there is reason to believe that an unsafe condition exists." "Unsafe condition" means any condition that could cause undue hazard or risk to life, limb or health of any person authorized, expected or anticipated to be on or about the premises or a building or construction" (per paragraph 1A.6.1.1 of Building Bylaw No. 8057).

Also relevant to this discussion is s. 271 of the *Vancouver Charter* which says that "it shall be the duty of the owner and occupier of any real property in the city to give to the Chief License Inspector, and any member of his staff authorized by him for the purpose, such access at any reasonable hour to such real property and every part thereof, and such information with respect thereto, as may be reasonably required to enable necessary inspection to be made."

- (c) Fire Department. The City of Vancouver is also empowered by its *Charter* to make bylaws providing that "any member of the Fire Department authorized by the Fire Chief may at any reasonable time enter any building or premises, or any part thereof, for the purpose of inspecting the same for conditions which may cause fire, or increase the danger of fire, or increase the danger to persons, and may order such precautions to be taken as are deemed necessary to reduce the danger of fire or danger to persons" (*Vancouver Charter*, s. 311(a)). Section 1.4.3. and 1.4.4. of Vancouver's Fire Bylaw No. 8191 are such bylaws. Section 1.4.3. also prohibits any person from obstructing the fire department in carrying out an inspection pursuant to this bylaw, or from preventing them from entering a building or residence at any reasonable time for the purpose of administering and enforcing this bylaw.

### What does all this mean?

Strata councils are increasingly concerned about the proliferation of drug labs and grow ops in their strata corporations. Of primary importance is the image that is portrayed about the strata corporation, but we have now also learned at insurance renewal time that insurance underwriters are not only asking questions but also requiring that steps be taken to prevent these operations. There are legal and ethical concerns also, and, at a very practical level, there are valid worries about the financial impact that may fall to the strata corporation. We have seen in the last year or two a number of grow ops where the plumbing has come loose causing thousands of dollars in damage. (Luckily, "touch wood", we have not experienced any fires, but the impact would be the same, and also there is the frightening element of personal safety.) Many strata corporations have insurance water deductibles of \$2,500 or more, and these deductibles will surely rise as more and more claims are placed with the underwriters to settle. Many of the claims to date have been in excess of \$25,000. How long will we have to wait before the underwriters exclude such claims altogether? Recognizing the limits imposed by law and by ordinary circumstances, strata councils must continue to consider methods to prevent grow ops and drug labs in their strata corporations.

As to providing the police access to strata lots, such as Robert did, this will continue to be a problem. On reflection, Robert probably did not have sufficient authority on behalf of the strata corporation to unlock the door but it is easy to understand how he got drawn into the trap. In most of these instances it is unlikely that a lawsuit against the strata corporation will result, since the bad guys avoid that kind of thing, but one day, someone will sue - most likely because the cops had it wrong and the strata lot was identified mistakenly. Those will be the interesting cases.

## 4. INVESTING YOUR MONEY

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A strata corporation must invest its Contingency Reserve Fund (per SPA s. 95(1)). This can be done only as prescribed by the SPA, which stipulates that only one or a combination of the following qualify for such investment purposes:

1. investments permitted by the regulations; and
2. insured accounts with savings institutions in B.C.

Note that section 95(2)(a) of the SPA, which originally read "those investments permitted to a trustee under section 15 of the *Trustee Act*", was repealed effective January 30, 2003 and replaced with "those investments permitted by the regulations". At the same time, regulation 6.11 was enacted. A copy is attached for your reference.

"Insured accounts" means:

In the case of accounts with a credit union, up to a maximum of \$100,000 is insured by the Credit Union Deposit Insurance Corporation, but note that this applies to the aggregate of all deposits with a given credit union for the benefit of the same beneficiary (i.e., different account numbers does not make them different accounts for this purpose, if they are in the name, or for the benefit of, the same strata). To qualify, deposits do need to be in Canadian dollars but they do not need to be for five years or less, unlike in the case of banks and trust companies (see below); and

In the case of accounts with other savings institutions in B.C. (i.e., chartered banks and trust companies), up to a maximum of \$60,000 is insured by the Canada Deposit Insurance Corporation, but this also applies only on a per depositor basis rather than on an account-by-account basis. To be eligible for this insurance, deposits must be in Canadian currency and payable in Canada. Further, such term deposits must be repayable no later than five years from the date of deposit.

While the vast majority of investments made by strata councils fall within the statutory range permitted, it is vital that you are aware of the limitations.

### **Permitted investments for investment of money from contingency reserve fund**

**6.11** A strata corporation may invest money from the contingency reserve fund in the following investments for the purposes of section 95 (2) (a) of the Act:

- (a) securities of Canada, a province, the United Kingdom, the United States of America or a municipal corporation in a province;

- (b) securities the payment of the principal and interest of which is guaranteed by Canada, a province, the United Kingdom, the United States of America or a municipal corporation in a province;
- (c) securities issued for school, hospital, irrigation, drainage or other similar purposes that are secured by or payable out of rates or taxes levied under the law of a province on property in that province;
- (d) bonds, debentures or other evidence of indebtedness of a corporation that are secured by the assignment to a trustee of payments that Canada or a province has agreed to make, if those payments are sufficient to meet the interest on all the bonds, debentures or other evidence of indebtedness outstanding as it falls due and also to meet the principal amount of all the bonds, debentures or other evidence of indebtedness on maturity;
- (e) bonds, debentures or other evidence of indebtedness of a corporation incorporated under the laws of Canada or a province that are fully secured by a mortgage, charge or hypothec to a trustee on any one or combination of the following assets:
  - (i) land;
  - (ii) the plant or equipment of a corporation that is used in the transaction of its business;
  - (iii) bonds, debentures or other evidence of indebtedness or shares of a class or classes authorized by this section;
- (f) bonds, debentures or other evidence of indebtedness of a corporation incorporated under the laws of Canada or a province if the corporation has earned and paid a dividend,
  - (i) in each of the 5 years immediately preceding the date of investment, at least equal to the specified annual rate on all of its preferred shares, or
  - (ii) in each year of a period of 5 years ending less than one year before the date of investment on its common shares of at least 4% of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;
- (g) guaranteed trust or investment certificates of
  - (i) a bank, or
  - (ii) a corporation that is incorporated under the laws of Canada or of a province and that has a business authorization to carry on trust business or deposit business;
- (h) bonds, debentures or other evidence of indebtedness of a loan corporation or similar corporation
  - (i) that at the time of investment has all of the following:
    - (A) power to lend money on mortgages, charges or hypothecs of real estate;
    - (B) a paid up nonreturnable capital stock of not less than \$500 000;
    - (C) a reserve fund amounting to not less than 25% of its paid up capital,and
  - (ii) the stock of which has a market value that is not less than 7% in excess of its par value;
- (i) preferred shares of a corporation incorporated under the laws of Canada or of a province if the corporation has paid a dividend,
  - (i) in each of the 5 years immediately preceding the date of investment, at least equal to the specified annual rate on all of its preferred shares, or

- (ii) in each year of a period of 5 years ending less than one year before the date of investment, on its common shares of at least 4% of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;
- (j) first mortgages, charges or hypothecs on land in Canada, but only if the loan does not exceed 75% of the value of the property at the time of the loan as established by a valuator whom the trustee believes on reasonable grounds to be competent and independent;
- (k) securities issued or guaranteed by the International Bank for Reconstruction and Development established by the Agreement for an International Bank for Reconstruction and Development, approved by the *Bretton Woods and Related Agreements Act* (Canada), but only if the bonds, debentures or other securities are payable in the currency of Canada, the United Kingdom, a member of the British Commonwealth or the United States of America;
- (l) fully paid common shares of a corporation incorporated under the laws of Canada or of a province that, in each year of a period of 7 years ending less than one year before the date of investment, has paid a dividend on its common shares of at least 4% of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;
- (m) deposits in, or non-equity or membership shares or other evidence of indebtedness of, a credit union.

[en. B.C. Reg. 33/2003.]