



FEATURES THIS MONTH

- 1. Your Insurance Policy: The Fine Print**
- 2. Licensing of Property Managers (Agents)**
- 3. Rental Restrictions and January 1, 2006**
- 4. Construction Contract Issues**

1. YOUR INSURANCE POLICY: THE FINE PRINT

Ah yes, the fine print. The stuff that causes angst and anger; the stuff that leads to accusations, blame, lawyers and courts. Hate it, but it is a reality of life, and, of your strata corporation's insurance policy.

Your actual insurance policy document contains dozens of pages (of fine print). You generally only see the summary page, but always remember that the summary page is only the good stuff. Any time you want to see the whole policy, just ask your strata agent: he or she can get you a complete copy as we keep them in stock.

The problem, of course, is that it is pretty deadly reading. Not only is it tedious but also it requires an intimate knowledge of insurance terms, jargon and concepts to fully understand. Few people, including ourselves, have the experience or skills to read it and really know what it says. This leads to a blind faith conclusion that your policy is adequate and properly meets the requirements of your strata corporation. Moreover, there might even be a reliance on the fact that the management company placed the policy so it must be okay since they know what they are doing. Hmmm...

In recent months and years, as you likely know from VCS bulletins about insurance, there have been significant changes to insurance benefits, coverages and deductibles. As one example, we now see renewal policies containing \$50,000 deductibles where claims arise from "grow-op" incidents. Most of us understand the concept here because it is, well, easy to understand, but check out the following recent situation in one of our strata corporations and wonder how easy this was to understand.

In the wee hours of a Sunday morning some malicious person turned off the gas to one of our strata corporations. (The gas station/meter is located in the adjacent laneway in a cage with a locked gate so considerable effort had to be made by the vandal to do this.) To make a long story short, the cost to restore the gas, access every one of 150 strata lots to purge the lines, re-light pilots, etc. amounted to \$5,600. Sounds like an insurance claim doesn't it? It did to us too, but alas after looking at the fine print, the insurance company said no. Yes it was vandalism, which is

covered by the policy, but no the vandalism itself did not create the \$5,600 loss to the corporation. “*Whoa*”, we argued, “*we have a loss of \$5,600*”. Sorry, no claim was the response - read the fine print. The loss from vandalism here for insurance purposes was only the cost of replacing the broken lock and repairing the damage done to the cage that enclosed the gas shut off valve. We disagree but the insurance adjuster had the last word and the only recourse for the strata council was to hire a lawyer and sue in Small Claims Court.

So councils, what are we saying here today in this article? We are saying “heads up”. The insurance policy you have is likely as good as you can get anywhere, especially recognizing the limited market for strata corporation policies, but it has limitations, some of which we have never seen before. That face page you get is great. It shows the amount of coverage and the deductibles, but not the exclusions or limitations - the fine print. Given what happened this year to the insurance market, most of us are relieved to just have insurance, but not much thought has gone into the depth (or lack of) the actual policy wording. We are not suggesting that council members start reading dozens of pages of fine print (an infallible cure for insomniacs) but be aware that there are many, many limitations and exclusions, not just deductibles. VCS, as your property management agent, has purchased the insurance policy on your behalf but we are not insurance experts and we are not purporting to advise on the merits or demerits of the program. We are struggling to keep up as much as possible and we will continue to alert you to “breaking news” such as the gas meter vandalism incident noted above, grow ops, etc. Please do not rely on us to interpret the policy.

Here is one last story for today’s article. Last winter (which was relatively mild except for a few days) one of our clients suffered a major water damage incident. The owner of an empty, vacant strata lot in an upper floor of a highrise building left all the windows and patio door open, and the heat turned off. We are not quite sure why the owner did this but, in any event, it was just when we had that short, cold snap and snap is exactly what the water pipes in that strata lot did. The total cost of repairs was about \$250,000. Ouch! This will have a huge impact on the renewal for that particular strata corporation. It is these kinds of horrific losses that affect all of us - not just VCS clients within the current umbrella arrangement.

Sorry about the gloom and doom of this article, but you do need to know.

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2. LICENSING OF PROPERTY MANAGERS (AGENTS)

Bill 41, The Real Estate Services Act has received Third Reading. It only requires proclamation and the implementation of companion regulations and Real Estate Council rules and bylaws, all of which we expect will be in place by early in 2005. At that time, all strata property managers (agents) will have to be licensed. We will advise you of further details once we know them. All of this will be costly and we will attempt to identify such costs by September in order that you can properly budget for 2005.

3. RENTAL RESTRICTIONS AND JANUARY 1, 2006

Rental restriction bylaws are among those that attract the most interest and debate with condo owners. And, this will increase in the next few years for a number of reasons. First, January 1, 2006 is a date as of which rental restrictions "kick in" vis a vis a certain class of strata lots. Second, the current boom in condo building in Greater Vancouver is apparently being fuelled to a significant extent by investors who intend to rent out their units. And, third, as discussed in our Information Bulletin No. 49, the Winter Olympic Games in 2010 will likely produce a new set of problems resulting from owners who see short-term suite rentals to Games' visitors as a not-to-be-missed "get-rich-quick" opportunity.

In every case, there is a grace period before a new rental restriction bylaw becomes enforceable. The principle is set out in section 143(1) of the *Strata Property Act* (the "Act"), which reads as follows:

143 (1) A bylaw that prohibits or limits rentals does not apply to a strata lot until the later of:

- (a) one year after a tenant who is occupying the strata lot at the time the bylaw is passed ceases to occupy it as a tenant, and*
- (b) one year after the bylaw is passed.*

However, there are some circumstances in which this time frame may be extended, as explained by section 143(2), which reads as follows:

143 (2) Subject to subsection (1), if a strata lot has been designated as a rental strata lot on a Rental Disclosure Statement in the prescribed form, and if all the requirements of section 139 have been met, a bylaw that prohibits or limits rentals does not apply to that strata lot until the earlier of:

- (a) the date the strata lot is conveyed by the first purchaser of the strata lot, and*
- (b) the date the rental period expires, as disclosed in the statement.*

Subsection (2) above applies to strata corporations in respect of a rental disclosure statement (in prescribed form) which was filed under the *Act* (in compliance with s. 139). As the reader will understand from the above, in such cases subsection (2) may extend the effective date of a rental restriction bylaw if the strata lot is still owned by the person who first bought it from the developer and if the rental period identified in the rental disclosure statement has not yet ended. In these instances, if by the time the rental restriction bylaw comes into effect pursuant to subsection (1) above, the strata lot has already been resold by the first owner (who bought from the developer), subsection (2) is of no relevance.

Where the rental disclosure statement was filed pursuant to the *Condominium Act* (the "*Old Act*") (again, always assuming it was in the form, and filed according to the procedure, prescribed by the *Old Act*), then the time limit set in subsection (1) above may be extended on a different basis. Regulation 17.15 of the *Act* provides that, in such cases, if the strata lot has by then already been resold by the person who first bought it from the developer, the rental restriction bylaw will not apply to that strata lot until the earlier of:

- (a) the date the rental period expires, as disclosed in the statement, or*
- (b) January 1, 2006.*

So, here is where the date January 1 of 2006 comes from in relation to rental restriction bylaws. In practical terms, the result is that where a rental disclosure statement was filed in respect of a given strata lot under the *Old Act* (and that statement complies with all the technical



requirements of the *Old Act*), this provision creates a grace period for strata lots that are no longer owned by the first purchaser. As far as we are aware it has not yet been determined by the courts whether this applies to second and subsequent purchasers or only to second purchasers.

The rationale for this exception is that under the *Old Act* the rental period given in the rental disclosure statement had been interpreted by the courts to apply to subsequent purchasers, whereas the *Act* was more carefully worded to clearly limit it to first purchasers. It was therefore thought to be only fair to give subsequent purchasers who may have bought condos expressly for investment/rental purposes before the *Act* came into effect, a fairly lengthy grace period in which to sell or occupy those properties. That is not to say that all such owners have thought this through or that they are even aware of it. One has no idea how many strata lots might fall into this category, but it is safe to say that a fair amount of confusion may result as January 1, 2006 approaches and thereafter.

In summary:

A bylaw that prohibits or limits rentals will never apply until at least one year after the bylaw is passed (assuming, of course, that it is properly passed and then filed in the land title office, per Division 2 of Part 7 of the *Act*).

Where a strata lot is already tenanted when the bylaw passes, the bylaw will not apply to that strata lot until one year after that tenant "ceases to occupy it as a tenant" (i.e., moves out or buys it), subject to paragraph 3 below.

If a properly filed rental disclosure statement in proper form applies to a strata lot and the time period stated in it during which the owner may rent has not yet expired at the end of the period applicable in paragraphs 1 or 2 above, then the bylaw will continue to not apply to that strata lot:

- (a) if the disclosure statement was filed under the *Old Act*, until the earlier of January 1, 2006 or the end of the rental period in the disclosure statement, whether the first purchaser still owns it or not (as noted above, we do not know if this exception will be interpreted to apply only to the second purchaser or to all purchasers subsequent to the first); and

- (b) if the disclosure statement was filed under the *Act*, until the earlier of the date on which the first purchaser "conveys" it [to a new owner] or the end of the rental period in the disclosure statement. In other words, where such a strata lot is already owned by someone other than the first purchaser when a rental restriction bylaw is passed, this provision will of course be irrelevant, and the effective date will be determined by reference to paragraph 1 or 2 above, as applicable.

Clear as mud? Here are some examples which may assist you in understanding this complex legal issue:

The Strata Corporation (100 strata lots) was registered prior to July 1, 2000 (i.e., under the *Condominium Act*) and the rental disclosure statement then filed indicated that all strata lots were intended to be rented indefinitely.

- After the developer sold all the strata lots the strata corporation passed a bylaw limiting the number of strata lots that can be rented at any one time to 10.
- Bob was an original owner and rented his strata lot from the beginning.
- Mary was an original owner but occupied her strata lot. In January 2004 she decided to move to Toronto for a job opportunity and she rented her strata lot with the consent of the council since only eight of the ten permissible "rental" strata lots were rented.
- Rashid was an original owner and he rented his strata lot from the beginning. In July 2003 he sold his unit to Sonja who continued to rent the strata lot.

On January 1, 2006 here is what we understand will happen, assuming the limit of 10 rentals has by then been reached:

- Bob: Bob can continue to rent indefinitely (as the rental disclosure statement indicates, assuming of course that there is no defect in the rental disclosure statement that would make it ineffective and unenforceable).



- Mary: Mary is in the same situation as Bob (she did not need to ask for permission to rent because the rental disclosure statement designated her strata lot as a unit entitled to be rented indefinitely, and the *Act* only changes that after she is no longer the owner).
- Sonja: Sonja will not be able to rent after January 1, 2006. She will have to give her tenant notice effective December 31, 2005, unless she qualifies for a hardship or family member exemption.

4. CONSTRUCTION CONTRACT ISSUES FOR STRATA CORPORATIONS

By J. Marc MacEwing, LL.B.

The “leaky condo” crisis has involved many strata corporations in major reconstruction programs having a scale, complexity and expense which exceed what would otherwise normally have been expected during the life of a building; however, every strata corporation from time to time finds itself involved in small or large construction projects, as part of normal repair, maintenance and renovation requirements. This unavoidable involvement with construction makes it advisable that strata council members are generally knowledgeable about the basic principles and common practical issues of construction-related law. The following are some of those principles and issues.

Construction Contract Procurement

Construction contracts can be procured by negotiation or tendering. As a matter of policy, tendering may be the preferred procurement method, in order to ensure both the reality and the appearance of impartiality and cost-effectiveness. Tendering is a unique aspect of contract law which has its own special rules and potential risks for owners, **including strata corporations**.

Case law has decided that the tendering process involves two contractual stages:

1. Contract A, which exists between the owner (your strata corporation) and each of the tenderers and the terms of which are contained in the owner’s tender documents; and
2. Contract B, which exists between the owner (your strata corporation) and the successful tenderer and the terms of which are contained in the construction contract.

The existence of Contract A gives rise to contractual rights and responsibilities of both the owner and all tenderers, and makes tender documents as legally significant as any other construction contract documents.

Owners have a duty to comply with the provisions of their own tender documents and a duty of fairness to all bidders. These duties have been interpreted to mean that an owner cannot reserve to itself the right to accept a tender which in some material way fails to comply with the

requirements of the tender documents, and must provide to all tenderers a “level playing field” with respect to the requirements of the tendering process.

In practice, these principles give rise to requirements such as the following:

1. All bidders must be provided with the same information prior to the tender closing.
2. Tenders should be evaluated only as submitted at the time of the tender closing.
3. Owners should not attempt to negotiate with tenderers during the tendering process.
4. Tenders which are materially non-compliant with the requirements of the tender documents should be treated as being incapable of acceptance.

Owners who are evaluating tenders must take into account the risk of a claim or claims for damages for breach of Contract A from one or more of the tenderers who considers that its treatment by the owners is wrongful.

For example, if an owner awards a construction contract to a low bidder whose tender was materially non-compliant, the owner risks a legal action by the lowest compliant bidder. That bidder would likely claim damages in the amount of its lost profit projected for the job. If the claim is successful, the owner might find that its liability for lost profit, interest, “Court costs” and its own legal expenses significantly exceeds the amount saved by accepting the low tender.

The complexities of tendering law and the attendant risk of liability of a tendering owner mean that strata corporations (and the design professional consultants who they engage to assist them) should be knowledgeable of tendering law principles and careful in the preparation of tender documents.

Construction Contract Format

Strata corporations may need to consider options as to the types of construction contract and contractual organization which best suit their needs.

Most construction contracts involve the owner contracting with a single general contractor. Some types of projects may be more amenable to a construction management arrangement, in which there is no general contractor, but multiple trade contractors contracting directly with the owner, usually managed by a construction or project manager who is separately contracted to the owner.

A strata corporation may also have a separate professional services agreement with an architect or engineer who designs the work and may inspect its construction and certify its payment and completion.

With respect to payment, most construction contracts are for a stipulated price/lump sum. The advantage to an owner of such an arrangement is the certainty of the contract price, which is generally subject to increase only for valid extra work or for delays for which the contractor is not responsible. Some types of construction, of which renovation is a typical example, have a potential scope which is difficult to forecast, and for which contractors may require a cost-plus arrangement. Because of budget constraints, even an owner who is prepared to enter into a cost-plus contract may wish to impose an upper cost limit by incorporating a guaranteed maximum price provision.

Whichever construction contract format is adopted, strata corporations should ensure that the contract is properly drafted and executed, that they understand the contractual provisions and that they perform fully their own contractual responsibilities. If standard form contracts are proposed to be used, their applicability should be reviewed and, if appropriate, they should be amended by properly drafted supplementary conditions.

Builders Liens

A builders lien is a remedy available to any contractor, subcontractor, material supplier or worker who has participated in the improvement of a property under construction. This includes architects or engineers who are contracted directly with an owner. The lien provides potential security against the land for the claimant's entitlement to payment. Liens usually arise when undisputed progress amounts are not paid or when there is a dispute as to what amount is validly payable.

For strata corporations carrying out work after the original construction of the development, the following are some of the main practical concerns relating to builders liens:

1. An owner must progressively retain a statutory holdback of 10% of a general contract or trade contract price until 55 days after substantial completion (or termination or abandonment) of the general contract or trade contract, subject only to partial holdback release for certified early-completing subcontracts.
2. If the aggregate value of the construction exceeds \$100,000.00, the owner must establish a holdback account in a financial institution and pay the holdback into that account progressively. The holdback account must be jointly administered by the owner and the general contractor or trade contractor.
3. Depending on the nature of the construction work, a lien may be filed against one, some or all of the strata lots in a strata corporation.
4. In the case of most construction projects, no liens will be filed. The absence of liens will be determined by property title searches of the strata lots and searches of applicable Supreme Court of British Columbia registries for the commencement of legal actions claiming liens against the holdback, after the end of the 55 day holdback period.
5. If there are no liens, the holdback can be released to the general contractor or trade contractor after the expiry of the 55 day period. If there are liens, the strata corporation must consider the alternative procedures for clearing title by posting security or paying the holdback into Court to discharge holdback liability.
6. An owner's lien liability to subcontractors and others claiming under a general or trade contractor is limited to the applicable holdback. An owner's lien liability to a general or trade contractor is limited only by the general or trade contractor's contractual entitlement.

It can be seen from the above summary of major construction law concerns that strata corporations face involvement in significant and complex legal issues when having construction



work carried out. It is recommended that responsible representatives of strata corporations educate themselves as to these concerns, and that legal advice be obtained when appropriate.

The foregoing article was prepared and contributed by J. Marc MacEwing of the law firm of Shapiro Hankinson and Knutson, located at 700 - 555 Burrard Street, Vancouver, V7X 1M8. Mr. MacEwing was called to the Bar of British Columbia in 1980. His preferred areas of construction law practice include builders liens, bonding and tendering, regarding which he has written and lectured extensively. He may be contacted by telephone at 604-684-0727, by fax at 604-684-7094 and by email at jmacewing@shk.bc.ca.

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