



## FEATURES THIS MONTH

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## 1. “MARCO POLO” EXPENSES

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Not the Marco Polo you remember from high school. We’re talking about Marco Polo, the lawsuit which occurred in 1999. Marco Polo Properties Ltd. was the name of the developer of a high-rise strata corporation in Surrey.

Not long after it was built in the early 1990’s, the owners discovered it had water ingress problems (“leaky condo”). In order to repair the property, something well in excess of \$1,000,000 was required and the strata council convened several Extraordinary General Meetings (as they were then called) in order to move forward with the repairs. The problem was that the developer still owned a significant number of strata lots and it used its votes to oppose the  $\frac{3}{4}$  votes to pass special assessments.

Frustrated, the strata council resorted to a different tactic. Remember that this was pre-Tadeson, so the strata council could not rely on this very important court case. (Tadeson is a case which addresses situations where strata corporation resolutions for (leaky condo) repairs are achieving more than 50% of the vote but less than 75%.) The council put \$2,467,000 into their operating budget and it passed. The developer still voted against the repairs but he did not have enough votes to prevent the budget from passing. A budget requires a 50% plus 1 majority, whereas a  $\frac{3}{4}$  vote requires 75%.

The developer, Marco Polo, sued and argued that the strata corporation budget could not contain a line item of \$2,467,000 for such a project. The developer lost, with the court agreeing with the strata council that, in the particular circumstances of that case, the money was required to repair and maintain the building as mandated by the *Condominium Act*.

That was an important decision because many strata corporations have passed budgets relying on the Marco Polo principle. So, for example, projects such as lobby improvements, new boilers, new roofs, garage gates, etc. have been included in annual budgets as a means of making it easier to get owner approval (i.e., 50% vs. 75%). Another benefit is that the cost is spread out over 12 months rather than over a few months as is typically the case with a special levy.

Notwithstanding the replacement of the *Condominium Act* with the *Strata Property Act*, strata corporations continue to fund such special projects through their operating budgets rather than through special levies. That might be a problem and VCS cautions its clients in this matter. We

are, of course, not purporting to offer legal advice, but it is our view that a close reading of various provisions of the *Strata Property Act* will lead you to conclude that the kinds of Marco Polo expenditures identified above are not suitable for annual operating fund budgets. They ought to be done by special levies, requiring  $\frac{3}{4}$  votes.

To date, we are not aware of any strata lot owner either within the VCS portfolio (about 15,000 strata lots) or in other non-VCS stratas, who has challenged his or her strata corporation on the inappropriateness (illegality) of a Marco Polo expense line. On the other hand, we see new challenges arising routinely and it may be just a matter of time before we have to face this issue. In such a challenge we can foresee an owner saying that he/she does not have to pay his/her strata fee because it contains an amount not authorized by the *Strata Property Act*. If a court agreed, it might be somewhat chaotic to remedy the problem. It is for this reason we advise strata councils to be "heads up" on Marco Polo expenses.

So, here is the trail to follow:

1. Section 92 of the *Strata Property Act* requires a strata corporation to have a budget. Specifically it states:

**92     *Operating fund and contingency reserve fund***

*To meet its expenses the strata corporation must establish, and the owners must contribute, by means of strata fees, to*

- (a) *an operating fund for common expenses that usually occur either once a year or more often than once a year, and*
- (b) *a contingency reserve fund for common expenses that usually occur less often than once a year or that do not usually occur.*

Carefully note subclause (a) "that usually occur either once per year or more often than once a year..."

2. Section 97 places very strict limits on the strata corporation when spending money from the budget (Operating Fund). It says:

**97 Expenditures from operating fund**

*The strata corporation must not spend money from the operating fund unless the expenditure is*

- (a) consistent with the purposes of the fund as set out in section 92 (a), and*
- (b) first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or authorized*
  - (i) in the budget, or*
  - (ii) under section 98 or 104 (3).*

Note “unless the expenditure is consistent with the purposes...”

(We are not reprinting sections 98 or 104(3) here but for your information, Section 98 has to do with “unapproved expenditures” which strata councils generally refer to and rely upon in respect of emergencies. Section 104 deals with “failure to approve budget”).

No doubt, some owner and/or his/her legal counsel may disagree with our analysis and opinion. So be it, but in the meanwhile, we are advising our clients to “err on the side of caution”.

## 2. OOPS - A CASE OF TOO MUCH EXPLOSIVE

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A recent police event in Burnaby may, at first, attract some amusement but on reflection, the final impact will be costly for one particular strata corporation but it may well impact all strata corporations insofar as insurance premiums and deductibles.

The strata corporation (thank heavens not one of our clients) had a resident “known to police” as they say, who decided to saw cut the safety rope of the window washer as the rope passed by his balcony. The police were called and, upon arrival, discovered that the resident had a dozen or more high-security locks on his apartment door. Not surprisingly, he did not open the door on the request of the police so they had no alternative but to break it down.

Because of the many locks, the standard technique of using a battering ram was ruled out and, instead, the door frame was coated with plastic explosive. “Stand back” were the last words anyone heard before the big blast, and good thing too. The door came off as planned but so did quite a bit of the adjacent walls, concrete floor and so on. Possibly a little less plastic explosive might have been better but that is the problem with hindsight. The estimated cost for repair? Somewhere in excess of \$100,000!!! It was an insurable expense.

There are various pressures already on insurance premiums from “911” to mega hurricanes and so on but now we are also facing increased costs to underwriters as a result of criminal activities. Keep in mind that “terrorist” acts are now excluded from insurance policies so whether it is “Al-K” or some other political whacko blowing up buildings (including your strata corporation) there is no coverage provided by your insurance policy. We see a trend to exclude coverage for claims arising from drug (grow-op) activities and these can be expensive. Even if they are not excluded, the claims are huge and this generates not just higher premiums but also higher deductibles. Within the VCS portfolio of 200 strata corporations, we have at least 20 properties that have water loss deductibles of \$50,000 or higher (i.e., up to \$100,000!).

Illegal activities are virtually impossible for you to control in your strata corporation although you should remain “heads up” to any possible suspicious activity to prevent losses.



Strata councils are often irritated (rightly so) when events such as the big blast above result in the strata corporation having to bear the brunt of the costly consequences. Councils would like to see the responsible owners/tenants pay for such damages rather than making insurance claims and paying for the deductibles but you have no choice. The law (s. 149(1) of the *Strata Property Act*) makes the strata corporation responsible to insure “(a) common property, (b) common assets, (c) buildings shown of the strata plan, and (d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot”. In the long run, we all pay for the acts of the criminals, the whackos and the terrorists. Welcome to 2005.

### 3. INSURANCE FOR 2005

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Although some of our clients have insurance policy renewal dates other than December 31<sup>st</sup>, most are at the calendar year-end and, although this article pertains to the coming renewal task, the content is useful for all clients.

#### BACKGROUND

Every three years VCS engages an independent insurance analyst/consultant to review the insurance market and to make recommendations to VCS for the placement of insurance. The result of this protocol is that a broker and underwriter structure is selected for the following three years. This arrangement does not preclude the wish of a strata council to "obtain quotes" for the second or third year. The arrangement does not lock in a client to the selected broker. A client can use whomever they wish, whenever they wish but in the final analysis the VCS program is the best arrangement. Keep in mind that there is no perfect policy: it is a matter of coming up with the best package which is made up of the depth of the policy, the service level and the premium.

The last review was done in the fall of 2003 by Copper Roof Riskmanagement. Clients at that time were given a copy of the report; however, if you are new on council, or cannot locate your report, copies can be obtained from VCS. Just ask your strata agent.

#### THE CURRENT PROGRAM

The outcome of Copper Roof's assessment last fall was the selection of BFL - Stewarts Insurance, a Canada-wide broker with excellent connections to the national and international insurance markets. The current policy expires at 12:01 a.m. on December 31<sup>st</sup>.

VCS is pleased to report that the service level from Stewarts through 2004 has been excellent. Although we do not profess to be experts in insurance policies, we do know from our day to day practical experience that the policy depth is as good as one can buy in the market. The premiums are competitive and, in fact, VCS clients enjoy a slight discount as a consequence of being in the VCS portfolio. Clients who leave VCS must enter into a new arrangement with Stewarts at higher premiums.

### THE PLAN FOR RENEWAL (2005)

Despite the wild ride over the past few years, things are apparently settling down in the insurance markets. The term they use is that the market is "softening". Translated this means that rates will likely increase but are not expected to skyrocket for 2005. Things can change quickly in the world today especially on the terrorist front and when we "predict" that rates will be modest, there is no guarantee at the end of the day. Keep your fingers crossed may be more appropriate. The spate of hurricanes this fall, giving rise to some \$30 billion in claims, is a concern but the impact may not be felt until 2006.

Typically, insurance underwriters in the past five years have not revealed their renewal terms until month twelve. This practice remains in effect; however, Stewarts has canvassed the market and has received general advice that renewal terms might be available as early as November. Stewarts has asked for our consent to proceed with renewal and we have granted consent. At this time, based on the three-year protocol outlined earlier in this bulletin, we do not intend to seek quotations from other brokers for the 2005 renewal. We repeat, however, if your strata council wants three quotes we will gladly obtain them for you. We do caution clients in the matter of the current market. There are companies out there offering strata corporation policies and all we can say to you is "heads up". The service levels are atrocious and the quality of coverage (i.e., the depth) is of concern to us. Buying insurance is no different than buying other products - each supplier is different and comparisons must be made far beyond the superficial review of the cover page.

### WHAT'S NEXT?

We will keep you informed. We hope to obtain the exact renewal quotes by the end of November and place confirmation with Stewarts in early to mid December. That would be nice for a change. We grow a bit weary of scrambling on New Year's Eve as we have had to do for several recent years.



## 4. A WORD FROM THE EDITOR

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Every month we publish various articles of interest (we hope) for our client strata councils. In many trade newsletters and consumer magazines, one commonly sees commentary from the editor about the current issue articles. We generally do not do this but this month we make an exception to our standing policy, which is what you are reading right now. The reason is that we really want you to take ten minutes at your leisure to read our article SOME VERY CANDID COMMENTS. Initially it has to do with us (VCS) but, in the final analysis it has to do with the future of your strata corporation.

Some council members reading this article may not be on council by the time our predictions come true, but the point of the article does have a lot to do with your current direction and philosophies which will impact your strata corporation in a few years whether or not you are still on the council.

We are aware that, upon reading this article, some people may take offence. Please be assured that nothing in it is intended to be offensive and we apologize in advance if anyone feels that they have been slighted. We do, however, want you to know some facts and, to do that, we must speak clearly and truthfully. The costs for management services in the coming years (sooner rather than later) are going to escalate dramatically. The proverbial "fork in the road" is coming up and only you can make the choice. Turn left, keep your management costs as they are now and take your chances. Turn right, pay more but be assured of quality and integrity. Turning left does not mean you will not succeed but it does mean you will have to be very watchful over your replacement management company. Turning right does not guarantee perfection but it does mean you will have a generally reliable company with integrity taking good care of your strata corporation's needs.

We welcome your feedback.

## 5. LET'S VOTE ON THAT AGAIN

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It is not uncommon at Annual or Special General Meetings to see votes taken a second or even third time - usually if the initial vote fails. This typically happens for  $\frac{3}{4}$  votes (rather than majority votes). Largely this results from the optics of the vote count.

When a vote is called for a simple majority (50% plus 1), usually for a budget, most people can easily view the hands/voting cards held up and determine that a vote passed or failed. Sometimes it is close but usually the optics are satisfactory. The problem arises at  $\frac{3}{4}$  votes and the human eye has a much more difficult time perceiving 75% versus 25%, and this optic is a much greater concern if it appears to the owners that a majority of owners approved a resolution. Many owners at AGMs or SGMs actually do not understand  $\frac{3}{4}$  votes so it is vital that the property agent and/or the council member chairing the meeting explain it with abundant clarity before the vote is called.

If a  $\frac{3}{4}$  vote is called and receives anything less than 75%, it is defeated but it is very common to hear owners in the audience then say "I didn't know what we were voting on", or "I thought we were voting on the amendment, not on the main motion" and so on. Also, it is not uncommon for owners (even if they understood all of the above) to be very frustrated with the outcome and suggest that further discussion take place which might clarify the issue and result in an opposite outcome.

Well, the question is how valid/legal is all this? Surely a vote is a vote and the outcome is evident. After all, just because the majority lost the vote, does that mean the resolution ought to be debated again? The technical answer is that no re-vote should be taken but it is not always that easy - particularly when a lot of owners state that they did not understand what was going on. Many such claims are genuine and not intended as a ruse. Property agents and council members take "a lot of heat" by holding on to a hard-line position so, again, it is not uncommon to see second or even third votes taken. You have to be very careful, however, as there is serious risk of challenge.

The *Strata Property Act* has a provision dealing with reconsideration of votes. (See Section 51). This is not the subject of this article. Section 51 gives owners the ability to require a special



general meeting to be called to reconsider a  $\frac{3}{4}$  vote in certain limited situations and circumstances. You should read the section but not right now. What we are talking about is the simple process of re-voting when owners claim they did not understand what was going on. The *Strata Property Act* does not provide any direction in this matter.

Some people refer to Robert's Rules of Order which gives direction to re-vote procedures. The problem with relying on Robert's is that no one (except experts) really understands them and to use one section here, one section there is extremely risky. Either you use it all or none of it. The *Strata Property Act* essentially relies on the two levels of vote counts: the majority vote (i.e., 50% plus one) or the  $\frac{3}{4}$  vote. Perhaps then it would be wise for strata corporations to rely on these levels when deciding on re-votes. VCS recommends that the 50% threshold be used. The rationale for this is that, except in those situations where a different voting threshold is specifically stipulated in the *Act* or bylaws, the principle of majority rule applies to strata corporations. A strata corporation is essentially supposed to operate like a mini democracy.



Every fall we ask our strata councils to assist us with respect to the security of our female strata agents following council meetings. We would be most grateful if you could ensure that your strata agent is safely escorted to her car after the meeting. Your assistance in this matter would be very much appreciated. Thank you.

## 6. OPTIONAL BYLAWS (PART 2)

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Following up where we left off in our last Information Bulletin on this topic, outlined below are a number of other bylaws specifically contemplated by the *Strata Property Act*, but not applicable unless specifically implemented by a strata corporation. Please note that this list is not exhaustive. For such, please consider consulting your legal counsel.

### 98 Unapproved expenditures

- (1) *If a proposed expenditure has not been put forward for approval in the budget or at an annual or special general meeting, the strata corporation may only make the expenditure in accordance with this section.*
  
- (2) *Subject to subsection (3), the expenditure may be made out of the operating fund if the expenditure, together with all other unapproved expenditures, whether of the same type or not, that were made under this subsection in the same fiscal year, is*
  - (a) *less than the amount set out in the bylaws, or*
  - (b) *if the bylaws are silent as to the amount, less than \$2,000 or 5% of the total contribution to the operating fund for the current year, whichever is less.*
  
- (3) *The expenditure may be made out of the operating fund or contingency reserve fund if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise.*

A bylaw increasing the per annum cumulative spending limit as per this provision will not be appropriate for all stratas. Consider your particular circumstances and the history of your operating budget expenditures to determine if a higher threshold might be preferable. One advantage of such a provision is that it can give council more flexibility and reduce the number of SGMs that have to be called to approve relatively minor unexpected expenditures.

NOTE, there are other subsections of section 98 not included here because they are not specifically relevant to the purposes of this article. But, if you decide to consider implementing a bylaw such as is contemplated by section 98 (2)(a), please first review and understand the whole of section 98 first.

## 110 User fees

*A strata corporation must not impose user fees for the use of common property or common assets by owners, tenants or occupants, or their visitors, other than as set out in the regulations.*

The regulation referred to here is 6.9, which reads as follows:

*For the purposes of section 110 of the Act, a strata corporation may impose user fees for the use of common property or common assets only if all of the following requirements are met:*

- (a) the amount of the fee is reasonable;*
- (b) the fee is set out*
  - (i) in a bylaw, or*
  - (ii) in a rule and the rule has been ratified under section 125 (6) of the Act.*

So, council cannot by itself set user fees. They must either be approved by a 3/4 vote resolution of the owners as a bylaw addition or introduced as a rule and then ratified by a majority vote of owners at a general meeting.

What is "reasonable" will depend on the circumstances. We urge stratas to use common sense as your guide.

## 122 Bylaws relating to sale of strata lot

*The strata corporation may pass a bylaw governing activities relating to the sale of a strata lot, including locations for the posting of signs and times for the showing of common property and holding of open houses, but the bylaw may not prohibit or unreasonably restrict those activities.*

What constitutes a "reasonable restriction" in this context is a moving target and will depend on the particular circumstances of each case, in our experience. The best approach to the application of any such bylaw, as with most others, is to allow for a little flexibility. The dual objectives of facilitating sales of strata lots by owners and ensuring the security of the building must both be accommodated.

Typically, such bylaws will provide for a dedicated sign post for "For Sale" signs in a visible location on common property near the entrance way to the strata. They will also allow for open houses but require appropriate security measures to be taken so that the flow of strangers in and out of the building can be appropriately monitored and controlled. VCS recommends that a lawyer with experience in such matters be retained to draft bylaws of this nature.

### 132 Maximum fines

- (1) *The strata corporation must set out in its bylaws the maximum amount it may fine an owner or tenant for each contravention of a bylaw or rule.*
  
- (2) *The strata corporation may set out in its bylaws*
  - (a) *different maximum amounts of fines for different bylaws and rules, and*
  - (b) *the frequency at which fines may be imposed for a continuing contravention of a bylaw or rule.*
  
- (3) *The maximum amount of a fine and the maximum frequency of imposition of fines must not exceed the maximums set out in the regulations.*

The maximums referred to immediately above are \$200 for a bylaw violation and \$50 for a rule violation, and the maximum allowable frequency is every seven days (see regulation 7.1). The one exception to this rule is that violations of certain rental restriction bylaws can result in fines of up to \$500, which again can be levied every seven days for so long as the violation continues (also set out in regulation 7.1).

Having different fine levels for different types of bylaw violations and allowing council some discretion in determining the amount in other cases, up to a specified maximum, may make good sense. Further, even if these maximums would in most cases be seen as too high for the types of bylaw infractions that usually result in fines in a given strata corporation, for some bylaw violations even these maximums will not seem adequate. Consider, for example, the case where an owner realizes that he/she is able to rent out a strata lot on a short term basis for \$200 - \$300 per night over the space of 14 days, such as many Vancouver area owners will theoretically be able to do during the 2010 Winter Olympics. Where such rentals are prohibited by bylaw, a \$500 fine, even if assessed every seven days, may not be enough to stop the practice in all cases. But, if the maximum fine allowed by your bylaws is only \$50, for example, or there is no provision for applying the fine every seven days, then the number of owners who might ignore the rental restriction bylaw in such cases can certainly be expected to be much higher indeed.

### Miscellaneous

Numerous other types of bylaws are clearly identified in the *Strata Property Act* as options available to strata corporations. These include such matters as age, pet and rental restrictions (see sections 123(2), 123(1) and 141 to 144, respectively), voluntary dispute resolution procedures (section 124), the commencement of Small Claims Court actions (s. 171(4)) and the creation of sections (s. 193). We do not have time or space to elaborate on these here and now, but intend to do so in future Information Bulletins.