



FEATURES THIS MONTH

1. Expressions We Use
2. E-Mail: The Good, The Unclear Directions, The Angry Owner and Other Assorted Ugliness
3. Installing Hardwood Floors
4. Case of Interest
5. Limited Common Property
6. Privacy And Owner Complaints

NEED GOOD SITES FOR STRATA CORPORATION INFORMATION?

Here are some sites you can access:

Strata U. - Continuing Education Department web site links of interest:

- Canadian Condominium Institute: <http://www.cci.ca>
- Condominium Home Owners Association: <http://www.choa.bc.ca/index.html>
- Clark, Wilson, Barristers & Solicitors: <http://www.cwilson.com/stratafaq>
- *Strata Property Act* information web site: http://www.qp.gov.bc.ca/statreg/stat/S/98043_01.htm
- Vancouver Condominium Services: <http://www.vancondo.com>

1. Expressions We Use - Where Do They Come From?

"Gossip"

Early politicians required feedback from the public to determine what was considered important to people. Since there were no telephones, TV's or internet blogs, the politicians sent their assistants to local taverns, pubs, and bars and were told to "go sip some ale" and listen to people's conversations and political concerns. Many assistants were dispatched at different times. "You go sip here" and "You go sip there." The two words "go sip" were eventually combined when referring to the local opinion; thus, we have the term "gossip."

The gossip these days is that Victoria is considering changes to the *Strata Property Act*. Do you have any suggestions as to how the *Act* can be improved? Let us know and we will pass them on to the politicians.

2. E-Mail: The Good, The Unclear Directions, The Angry Owner and Other Assorted Ugliness

To say that email continues to have a serious impact on the day to day of business and life in general is about as prescient as betting on the internet hanging around for the next few years. It is simply here to stay and has largely taken over as one of the most preferred ways in which people communicate. Fast, easy, efficient... what's not to love, right? We will dive right into that.

Some of the most difficult challenges we currently have are the issues that council attempt to deal with between regular council meetings. Here is the problem: The council meeting has taken place, the quotes have been reviewed, votes have been taken, decisions have been made, and the costs approved and direction given to the agent recorded in the minutes... and the following week, a council member sends an email either suggesting to the group or even giving outright direction to the agent to take significant action or incur an expense that has not been properly discussed and approved. We know you are just about done with all of the bulletins, memos, etc... on the issue of authorization. While that is a major, major issue here, what we want to point out is the surprising inefficiency that arises in this situation when addressed via email.

Simply put, this email usually goes back and forth and around and around, with many members not weighing in and the author of the original email getting upset that the agent has not done as they have asked. Should we be taking action at the direction of one member because he or she sent an email telling us we should? Here is the bottom line: Unless there is an emergency situation that



requires a very timely response or action (i.e., a hardship rental letter is received that requires a quick turnaround, an immediate repair is required, etc.), council and the agent should add the item to the agenda of the next scheduled council meeting. This will allow for a full discussion by a quorum of the strata council and the recording of the decided action in the meeting minutes. This is very important to ensure there is agreement and clarity and also for future reference.

This does not include items that require immediate action (boiler/water tank leak) or where council needs to be advised and discuss an arising matter (grow op is discovered) or when a single email can get a needed point across; this is where the efficiency of communicating by email can be realized. The alternative is often an email of ambiguous direction (and, unfortunately, at times specific to one council member's personal agenda) being shot out between meetings to which no one responds. This is incredibly inefficient and the time wasted for both council members and the agent can be enormous.

You might ask: "Where does the legislation preclude regular business being conducted by email?" While your bylaws are likely full of examples that answer this query (from the proper manner of calling a council meeting to conducting business at that meeting, the quorum of such meetings, and many other such applicable examples), it is the absence of reference to email in the *Act* and any guidelines for its use that prevents us from being able to consider it as a de facto council meeting.

On the matter of owners telling VCS that we have to accept and respond to their emails, here is the quick answer: We do not accept emails from owners.

The VCS email system belongs to the management company, not the strata corporation, and is for inter-office use, and correspondence with councils and contractors. With the very few exceptions such as the owner living overseas and many time zones away, that is it. Why? Sure, it may hurt our feelings when we get comments like "it is time to respect the arrival of the electronic age" and not accepting emails is "an insult to technology", but here is a question... How well do you think timely management and communication would work with approximately 16,000 residents sending in emails on issues of varying levels of emergency? The danger here is that important or emergency matters requiring immediate attention could be lost in the sea of emails when a phone call will allow for timely action. It is somewhat bizarre how often people complain about not being able to speak with a live person in today's world, and yet here we are dealing with the exact opposite.

If owners want to email their councils, they can do so if the strata corporation gets a webpage; otherwise, VCS has the right to control who has access to our email system. So for efficient transfer of information and "manageable management" of that information, even in this age of ever-changing and advancing technology, the phone system still proves to be an excellent

communication tool... even for angry owners who insist that we are behind the times. Call us old fashioned, just call us.

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3. Installing Hardwood Floors

Some owners want to replace carpets in their suites with hardwood or laminate flooring. Often they run into challenges from their councils and VCS is often asked:

Can a strata corporation prohibit the installation of hardwood or laminate floors?

Can the council enforce bylaws that prohibit hardwood and laminate floors, given the fact that the installation of this type of flooring does not amount to a structural change?

The answer is found in the *Strata Property Act* and in decisions of the courts. It appears that the courts will not interfere with the rights of strata corporations to govern themselves through the enactment of bylaws unless the bylaws are unlawful or offend the *Strata Property Act*. However, the courts will interpret the bylaws narrowly in order to give owners the greatest individual autonomy. Other than those broad principles, there is no clear consensus on the boundary between individual rights and those of the corporation as a whole, so it is likely that each case will turn on its particular facts.

The Legislation

Looking to the governing statute, there is a sound basis in the *BC Strata Property Act* for the enactment of bylaws governing the use of strata lots and other property:

Nature of bylaws

- 119 (1) The strata corporation must have bylaws.
- (2) The bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation.

The limit to this freedom to make bylaws, found in s. 121 of the *SPA*, includes that a bylaw is not enforceable to the extent that it violates the *Human Rights Code* or other laws or infringes on easements and the right of alienation (for example sale) of property. There are prescribed remedies that may be sought if a bylaw is contravened:

Enforcement options:

- 129 (1) To enforce a bylaw or rule the strata corporation may do one or more of the following:
- (a) impose a fine under section 130;
 - (b) remedy a contravention under section 133;
 - (c) deny access to a recreational facility under section 134.

However, s. 135 limits the application of remedies against owners if there has been no complaint, and if the owner has not been given notice of the complaint and an opportunity to address the complaint and make an answer:

Complaint, right to answer and notice of decision:

- 135 (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,
- ...
- 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

...

(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.

Unless the protocols contained in the *SPA* are followed, a strata corporation does not have the authority to seek a remedy or impose a sanction against an owner.

The Courts

The BC Supreme Court considered the application of the *SPA* as it pertains to bylaws in *The Owners, Strata Plan VR19 v. Collins*, (2004) BCSC 1743. In that case, a strata lot owner proposed to put a hardwood floor in their suite. At the time the owner made this known to the strata council, there was a bylaw prohibiting such installations on the upper floors of the building, with limited exceptions for hallways, kitchens and bathrooms.

Both parties agreed that the strata corporation could make bylaws that do not offend s. 121 of the *SPA*. Because of this, the court did not consider the issue of the limits to bylaw creation. Instead the court considered the enforceability of the flooring bylaw, and this analysis can be applied to bylaws generally. The court found that, in order to enforce a bylaw, it must be shown that the bylaw has been contravened. Given the fact that the flooring was not in compliance with the requirements of the bylaw, the court decided that this threshold test had been met.

The next consideration was what manner of enforcement mechanisms were available to the strata corporation. Section 135 of the *SPA* prevents certain actions against an owner or tenant for enforcement of a bylaw if there has been no complaint and the owner has not then been given notice and an opportunity to respond.

The court declared that it was unclear whether a complaint would have to be in relation to the flooring installation or to any resultant noise. This is an important distinction. What the court found was that the strata council could not initiate a complaint regarding noise and must wait for an owner to complain. That is because, in order to enforce a bylaw, it must be shown that the bylaw has been contravened. So if neighbours do not hear anything, the noise bylaw is not

offended. The court found that a complaint about the installation itself was a different matter, and the court declared that the strata council could be taken to have made the complaint themselves, because the existence of the hardwood flooring where it is prohibited establishes the contravention.

Applying a strict interpretation of s.135 of the *SPA*, the court found that because the owner was denied a hearing before the strata council, the owner could not be made to pay the costs of remedying the contravention; however, the strata council could still take action to remedy the bylaw infraction. The court directed the owner to stop contravening the flooring bylaw, but also directed that the strata corporation could not require the owner to pay the costs of the action to enforce the bylaw, as the strata council had not followed the protocols in s. 135 of the *SPA*.

In the earlier decision in *Harvey and Genge v. The Owners Strata Plan NW 2489*, 2003 BCSC 1316, the owner of a strata lot gave notice to their strata corporation that they intended to install a floating hardwood floor in their suite. The strata council responded with a requirement that the owner enter into a covenant to be registered against the strata lot that addressed the issue of sound emanations from the strata lot as a result of the new floor. The council took the position that the owner had to obtain permission before installing the floor, but the owner was of the opinion that the bylaws as they then existed did not impose any obligation to seek permission for the hardwood floor.

The strata corporation levied fines and costs for legal fees, and threatened legal action against the owner. After the strata corporation put a lien on the strata lot, the owner applied to the court to find, among other things, that the installation of flooring was not a structural change and that the imposition of charges against the owner was unfair.

The strata corporation's bylaws included a prohibition against nuisance uses of the strata lots, a requirement that written permission be obtained from the council before any structural changes were made to a strata lot, and a provision that prohibited structural alteration, but allowed other interior alterations as long as the alterations did not affect any other strata lot.

The court found that the essence of the dispute was whether the installation of hardwood flooring constituted a structural alteration. In her judgment, Madam Justice Balance examined the

meaning of the word 'structure' and the nature of hardwood flooring. The court found that the flooring was more akin to a decorating choice such as painting or installing cupboards than a structural change, and that the enforcement of a prohibition of this type would prevent ordinary decorating choices by owners and would produce absurd results. A structural change would be more akin to adding a room or removing a load-bearing wall, or fundamentally reconfiguring the dimensions of an existing space.

The strata corporation submitted that the bylaws are to be construed strictly for the benefit of the general welfare of all the owners. As such, the corporation has a responsibility to ensure that nothing disrupts the common scheme. The court considered this submission in light of the BC Court of Appeal decision in *Buchbinder v. Strata Plan VR2096*, (1992) BCCA 132. The owner in that case had placed a free standing shed on their patio and the strata corporation attempted to force the removal of the shed based on the reasoning that the wishes of an individual owner cannot supersede the interests of the community as a whole. In her judgment in *Buchbinder*, Justice Proudfoot states:

The principle of community living has only been applied where there has been a clear infraction of a condominium by-law. The argument advanced is that when people join a condominium, development they agree to abide by the declaration of community living. In the case at bar, a garden shed being placed on a patio was not specifically prohibited by the by-law ... It would be unreasonable to conclude that, based on the principle of community living, condominium owners should assume they are not entitled to place any object on their patios.

...[the] garden shed does not fall within the specific prohibitions of the by-law. It is not a change to the building's exterior and is not an addition to or an enclosure of the limited common property. To give such a broad interpretation to the by-law would make matters even more difficult for condominium owners trying to interpret ambiguous and generalizing by-laws. If the Strata Council wants to prohibit garden sheds, or similar free-standing structures, they can easily adopt such course of action.

The court's decision in *Buchbinder* leads to the conclusion that bylaws will be interpreted narrowly. In addition, the requirements of community living do not prevent an individual from exercising autonomy within the confines of their strata lot as long as they do not unreasonably

interfere with their neighbours. Applying the analysis in *Buchbinder*, the court in *Harvey and Genge* found that the installation of hardwood flooring did not violate any applicable bylaws of the strata corporation or the legislation. The court also struck down the various charges levied against the owner by the strata corporation.

In *Harvey and Genge* the court follows *Buchbinder* and concedes that the strata corporation is certainly acting within its authority if it bans a specific type of flooring, but the court found there was no nuisance, as there were no complaints by other residents as a result of the flooring installation. The court concluded that the bylaws and indeed the governing legislation were not offended by the installation.

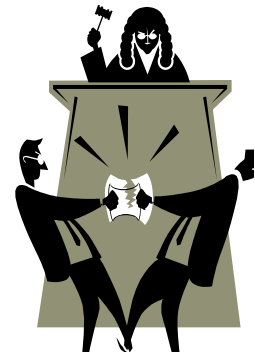
Conclusion

The courts in all of the cases cited above were reluctant to interfere with the right of strata corporations to enact bylaws that govern their affairs. Despite this, the courts do appear to adopt the narrowest possible interpretation of those bylaws in order to afford the greatest liberty to individual owners and limit the infringement of the collective on individual rights. In *Collins*, for example, the court found that the owner had not been given the opportunity to address the alleged infraction at a hearing, so no costs were assessed. In *Harvey and Genge*, the court interpreted the bylaws and applicable statute narrowly and determined that no violation had occurred. Similarly in *Buchbinder*, the court employed strict interpretation of the bylaws and found the action of the owner did not fall within the specific prohibitions contained in the bylaws. It appears that the judicial consensus is that a specific bylaw proscription will stand, but a balancing of individual and community rights will usually be decided in favour of the individual. It is possible that, because of this preference for individual over collective rights, applications to evade intrusive bylaws will be received favorably by the courts, and will inevitably lead to the least oppressive sanctions against individual owners.

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4. Case of Interest

Some months ago we advised you about the Le Soleil case. A decision was rendered by the B.C. Supreme Court and it essentially had to do with the conduct of a strata council, or in this case, the misconduct of the strata council which led to the council members (except one) being held responsible to repay their strata corporation some \$200,000.



The strata council appealed the decision and lost (with one of the three judges dissenting). It is worth reading so look it up and spend 30 minutes in quiet time to get the gist of it. Hard lessons learned here....of value to all strata council members.

You can locate the case at

<http://www.courts.gov.bc.ca/jdb-txt/ca/07/01/2007bccca0183.htm>

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5. Limited Common Property

Limited common property (LCP) is defined in the *Strata Property Act* as "common property designated for the exclusive use of the owners of one or more strata lots". Common examples of LCP are balconies, patios, and in some cases, parking spaces. There is no consistent practice in designating LCP. For example, sometimes balconies are LCP in one strata, but in other stratas they are part of an owner's strata lot. The best way to find out if an area is LCP is to check the strata plan and the resolutions dealing with common property filed at the Land Title Office.

Common property can be designated as LCP by the developer or by the owners. A developer designates LCP on the strata plan filed in the Land Title Office. Once the strata plan is filed, the developer can amend the strata plan to designate parts of the common property as LCP but only for the purpose of designating existing parking stalls. If owners want to remove the developer's LCP designation they need pass a resolution passed by unanimous vote to amend the strata plan, then file either a reference or explanatory plan as required by the Registrar of Land Titles.

Once the owners take over from the developer, they can change the designation of common property to LCP either with or without amending the strata plan. There are two distinct processes:

Amending the Strata Plan: Under s. 257(a) of the *SPA*, the owners can change the designation from common property to LCP by passing a resolution passed by unanimous vote at an annual or special general meeting. The strata corporation then applies to the Registrar of Land Titles to amend the strata plan and files a Form E Certificate to certify the resolution was passed. The new designation of LCP then appears on the amended strata plan.

No amendment to the Strata Plan: Under s. 74 of the *SPA*, the owners can designate common property as LCP without amending the strata plan by a resolution passed by $\frac{3}{4}$ vote at an annual or special general meeting. The owners then file the resolution at the Land Titles Office with a drawing showing the location and dimensions of the LCP along with a declaration stating which strata lots have exclusive use of that new LCP. The new designation of LCP does not appear on the strata plan, but the resolution is recorded at the Land Title Office once it is filed.

Although LCP is still common property, an owner or group of owners has exclusive use. The strata corporation maintains regular common property for the benefit of all owners, but what about LCP? The answer to that question depends on the individual circumstances. In cases of parking stalls, maintenance like paving and pressure washing are generally undertaken by the strata corporation, and all owners share the costs. This is because all share in the benefits of maintaining the strata property as a whole.

In less clear-cut situations, such as for patios and balconies, many strata corporations have bylaws to assign responsibility for of LCP maintenance, while others do not. Where the bylaws give no clear direction, there can be uncertainty, and that often leads to squabbles.

One recent example that VCS has seen first-hand was a complaint by a strata lot owner regarding the drainage area on the edge of their patio. The owner wanted to install decorative brickwork at the end of their patio, while the strata corporation's contractor had always put crushed stone there to allow the drain to work properly. There was a serious discussion, and VCS was able to find a creative solution: The contractor was asked to propose improvements that met the owner's aesthetic needs while maintaining the proper function of the drains. The owner bore the cost of the work over and above the costs of the basic stone drain covering. The estimates and opinion of the contractor were provided free as a goodwill gesture. The strata corporation acknowledged their duty to maintain common property. The owner agreed that many owners improve their LCP, and it would be unreasonable to expect their neighbours to bear the extra costs.

The responsibility for patios and balconies that are LCP is often difficult to determine. In *Moure v. The Owners Strata Plan NW2099*, the owners of top floor units had the right to use the roof patio areas adjacent to their strata lots as LCP. The owners even went so far as to replace the original tiles with new ones more suited to the weather in Vancouver.

The tiles eventually wore out and the strata corporation agreed to replace the roof surface, but would only pay for concrete pavers instead of ceramic tile. The court found that the strata corporation had a duty to maintain the roof which was common property, but only to the extent that it benefited the building as a whole and did not diminish the interests of the LCP users. The owners had a right to pay for upgrades beyond the basic repairs needed for the rooftop patios, but the strata corporation did not have to contribute. As the court declared: "Limited common property must be seen as a special category of property over which the unit owner has a substantial degree of control and something approaching a beneficial interest ... While it is reasonable for the strata corporation to refuse to pay for ceramic tile, it would be substantially unfair to allow it to prohibit the use of that material if the petitioners assumed the additional installation costs". In order to address the issues of responsibility for upkeep, the court decided that the strata corporation could amend its bylaws if it wanted to assign the cost of the upkeep of the LCP to the unit owners who had use of it.

Another interesting case dealing with LCP is an old Ontario Court of Appeal decision in *York Condominium Corp. No. 59 v. York Condominium Corp.* In that case Justice Cory described repair of LCP this way:

The concept of repair ... should not be approached in a narrow legalistic manner. Rather, the court should take into account a number of considerations. They may include the relationship of the parties, the wording of their contractual obligations, the nature of the total development, the total replacement costs of the facility to be repaired, the nature of the work required to effect the repairs, the facility to be repaired and the benefit which may be acquired by all parties if the repairs are effected compared to the detriment which might be occasioned by the failure to undertake the repairs. All pertinent factors should be taken into account to achieve as fair and equitable a result as possible.

What these cases mean is that the strata corporation has a responsibility to maintain LCP, but only to the extent that the upkeep can be linked to benefit for all the owners. Maintaining balconies or parking areas benefits all owners to the extent that it preserves the integrity of the building as a whole. Anything beyond basic maintenance is usually the responsibility of the strata lot owner who enjoys the benefit of the LCP. All of this is subject to any bylaws that assign specific responsibilities to either of the parties, and of course the overall nature of the legal relationship between the strata lot owner and the strata corporation.

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6. Privacy And Owner Complaints

It is a fact of life that owners complain to their strata council about the actions of other owners, usually in regard to bylaw infractions such as noise, parking, pets, or other conduct issues. When this happens, should the strata council reveal the identity of the complainant to the other side?

A recent decision of the Alberta Information and Privacy Commissioner may shed some light. Alberta now has legislation similar to the BC *Personal Information Protection Act*. In the Alberta case, the complainant owner accused another owner of displaying a flag on his balcony, contrary to the condominium bylaws. The accused owner asked to see the complaint letter, and the board (the Alberta equivalent of a strata council here) refused. The accused owner went to the Alberta Provincial Court and the court decided that the accused owner could not see the letter.

After the court decision, Alberta passed its own privacy legislation called the *Personal Information Protection Act*. The accused owner asked the Commissioner to order access to the complaint letter because it contained personal information about the owner. This same right to access your personal information held by a strata corporation is also found in section 23 of the BC *Personal Information Protection Act*.

The Alberta Information and Privacy Commissioner found that the legislation does apply to condominium corporations, but the letter could not be revealed because it was submitted in confidence. There is no section in our BC legislation identical to that part of the Alberta legislation, but s.23 (4) (c) of the BC *PIPA* allows corporations to withhold information if "the disclosure would reveal personal information about another individual". Also s. 23 (4) (a) prohibits disclosure if the disclosure could reasonably be expected to threaten the safety of an individual. Under our legislation, personal information does include contact information, but contact information is defined as "information to enable an individual *at a place of business* to be contacted". Information about a person's home address is not included.

There are no BC decisions under our legislation that apply to the circumstances yet, but it seems likely that, if a complaining owner asked that their information be kept secret, a strata council would have to agree in order to be in compliance with the law here.

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