



## FEATURES THIS MONTH

1. Expressions We Use
2. Just a Minute
3. Grow Ops
4. Loans from the CRF
5. Shuffling Money Around

## 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](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?

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In George Washington's days, there were no cameras. One's image was either sculpted or painted. Some paintings of George Washington showed him standing behind a desk with one arm behind his back while others showed both legs and both arms. Prices charged by painters were not based on how many people were to be painted, but by how many limbs were to be painted. Arms and legs are "limbs," therefore painting them would cost the buyer more. Hence the expression, "Okay, but it'll cost you an arm and a leg."

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It won't cost you an arm or leg, or anything for that matter, if you would like to voice your opinion to the provincial government about the *Strata Property Act*. The Ministry is presently considering changes to the statute (now almost seven years old) and it is a great opportunity for you to state your point of view. No arms, no legs, nothing at all to pay. Just put "pen to paper" and send it to VCS. We will forward it to the Ministry.

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## 2. Just a Minute

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Strata councils often wonder what to include in minutes. Minutes are important because they record the events at strata meetings. It is no accident that section 35(1) of the *Strata Property Act* says that the strata corporation must prepare minutes of every general meeting and every strata council meeting, including the results of all votes. In fact, minutes are so important as a record of proceedings that the strata corporation must keep copies for six years.

Some councils may feel tempted to change the minutes instead of just reviewing for errors and omissions. For example, taking out topics that were discussed at the meeting and/or adding items that were not discussed at the meeting but thought of afterwards. This is never a good idea. Strata councils have a duty to act in good faith (*SPA* s. 31) and so it is important that minutes be complete and accurate. They could be used later in court or other legal proceedings, and should be treated as official documents. You already know they are important in purchases and sales of strata lots. Most strata purchase agreements contain a clause that says: "*This agreement is*

*subject to the purchasers reading and approving the strata council's minutes, bylaws and financial statements".*

Here is a list of things that must be in the minutes:

- The name of the strata corporation, i.e. VR0000
- The nature of the meeting: AGM, SGM, executive, etc.
- The location, date and time of the meeting
- Who was present, any latecomers or persons who absent themselves either temporarily or for the rest of the meeting, especially in cases of conflict of interest
- Counsel members' regrets (no-shows)
- The business of the meeting. An important rule regarding details would be to consider whether or not a person who had no prior knowledge of the strata could pick up the minutes six years from now and get a clear sense of what happened.
- Litigation. Section 167 (1) of the *SPA* says the strata corporation must inform owners promptly if it is sued
- Every resolution, and the results of the vote. Proposed amendments should be described, especially if they are adopted
- If a precise vote count is requested, the exact numbers for and against
- If items were discussed *in camera*, and if those items are not included in the minutes
- Any abstentions and disclosures of conflict of interest by council members and the nature of the conflict

What should not be in the minutes:

- Defamation, such as a false statement or innuendo about someone that tends to lower the persons reputation in the strata community.
- Derogatory or critical statements about an identifiable person, like "that windbag Mr. Bloggs dominated the meeting with his usual rant about xyz".
- Misrepresentation, such as portraying facts in an untrue (but more favorable) light
- Inaccuracy, for example not getting fact or numbers right.
- Omissions, i.e. 'forgetting' to include references to building defects or issues raised at the meeting

One situation that challenges strata councils is when to include the identities of owners and council members in minutes. Some owners insist that their names should not appear in council minutes. So when should their names be included? Names or unit numbers may be included in situations where the owner ought to expect public notice of council decisions, such as approval for renovations or unit repairs. Other times when the issue is more contentious and potentially damaging to reputations and privacy, it is better to keep the identities anonymous. The most common situation of this type includes noise complaints, where both the complainant and the person complained about expect some measure of privacy. One way to determine when to include identities in minutes is to ask yourself whether or not you would object if you were one of the parties involved.

Remember, owners will rely on the information in the minutes. Buyers will base their decision to purchase at least in part on the minutes. Sellers will be liable for anything not disclosed and will share the liability with the strata corporation. Every statement ought to be verifiable, and the minutes should always provide a true account of what happened. Not every detail about how the discussion was arrived at needs to be included in the minutes. That said, the strata council should be able to advise owners through the minutes about the outcome of their decisions. Also, with respect to general meetings, it is important to document that each item of the agenda was dealt with properly. For example, it is important to clearly document how resolutions are amended and what the outcome is when they are voted upon. If the strata corporation has to defend the outcome of the vote later, they have a document that shows what happened, and how it came to be.

The SPA places strict requirements on the minutes that strata corporations create.

Why? Because they are so very important!

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### 3. Grow Ops

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A recent BC Supreme Court judgment may serve as a warning to strata owners. If you allow a grow-op in your suite, you will pay the price. In *Pham v. The Owners, Strata Plan NW2003*, the owner of an apartment in a strata complex in Surrey allowed her apartment to be used as a grow-op. She claimed she had rented the apartment to the 'indoor farmers', but the strata council disputed this claim. The owner did not inform the strata corporation of the alleged rental, as required by the bylaws.

The grow-op caused significant damage to the suite and to neighbouring units, including the growth of mould, asbestos contamination, and dangerous modification to electrical wiring. In February 2005, the police raided the grow-op and it was shut down. The strata corporation, through its agent (not VCS), wrote to the owner advising her that she would be responsible for damages. The agent also noted that no strata fees had ever been paid by the owner and she was substantially in arrears. Ms. Pham ignored the letter. The strata corporation wrote a second time and this letter was also ignored. The second letter outlined the violations of the bylaws including:

- Causing a nuisance
- Interfering with other owners' right to enjoyment of their property
- Illegal activity in the unit
- Using the unit for a purpose contrary to which it was supposed to be used
- Failing to advise council that the owner would not be living in the unit

Finally the strata corporation informed the owner that remedial work would commence on her suite and the other damaged areas, and that she would be charged the cost of repairs. This letter was also ignored. The repairs cost almost \$107,000 and the owner was billed. The strata corporation put a lien on the property when the amount was not paid. The owner sold the property after the repairs were completed and the proceeds remaining after the mortgage was paid amounted to \$61,500. That money was held in trust pending legal action.

Ms. Pham sued the strata corporation claiming that it did not have the authority to carry out the repairs or to charge for them. She claimed among other things that she did not receive notice that money was owing to the strata corporation, that there was no complaint of a bylaw infraction so the strata corporation could not act to enforce its bylaws, she was never offered the opportunity to make repairs, the strata corporation did not maintain sufficient insurance for the loss, and the lien was not properly filed.

The court disagreed with Ms. Pham's submissions in their entirety. Despite her argument that she was not responsible for the damage to the property because she was renting the unit to a third party, the court decided, citing sections 3 and 133 of the *Strata Property Act*, that the strata corporation is responsible for maintaining the property of the strata corporation and it may do what is reasonably necessary to remedy a contravention of its bylaws and rules including doing work on a strata lot or common property, and it may require that the reasonable costs of remedying the contravention be paid by the person responsible. In this case, that person was the owner, Ms. Pham. Whether she was a landlord or not, she was the owner of the strata lot. In the court's view the *SPA* and the bylaws provided the strata corporation with the authority to carry out the repairs and charge the offending owner for them.

The strata corporation, through its management company (not VCS) filed a lien on the title to the owner's property. (See Editor's note at the end of this article.)

The court found that proper notice of the repairs was given and that a notice of a complaint was received in writing by the owner, because the strata corporation wrote to her on several occasions setting out the particulars of the complaint, and later the amounts owing for repairs. The *SPA* makes no provision for the owner to undertake repairs, and the court found that the owner did not offer to do so at any relevant time. As for the lien, the court did not make a ruling as the property was already sold and the lien had been removed by the time the issue was raised in court.

Finally in regard to insurance, the court found that sufficient insurance cover was in place (in excess of fifteen million dollars) but the insurable loss, which was the proportion of the cost of repairs covered by the insurance policy was below the \$50,000 deductible for grow-op claims.

There was no evidence that the strata corporation could recover under the insurance in place, and the insurance was more than adequate.

The court found that the strata corporation had at all times acted in good faith and in compliance with the SPA, and awarded \$106,730.39 plus interest to the strata corporation. The court also declared that it would be unconscionable to require the strata corporation to bear the burden of the repair costs and thereby permit Ms. Phan to benefit from her conduct.

The owner learned the hard way that crime does not pay.

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Editor's Note:

A strata corporation can register a lien **only after** giving the owner at least two weeks' written notice demanding payment and advising that a lien may be registered if payment is not made within two weeks (*SPA* s.113). Under s. 116 of the *SPA*, the lien may cover the owner's indebtedness for:

- Strata fees and interest owing
- Special levies
- Reimbursement to the strata corporation for work done for which the owner is responsible
- The strata lot's share of a judgement against the strata corporation
- The reasonable costs and disbursements for filing a lien.

Under s. 116(3) of the *SPA* the strata corporation **cannot** register a lien for outstanding fines or the cost of remedying a contravention of the bylaws or rules. In addition, the strata corporation **cannot** register a lien for disputed amounts if the owner has paid the amount into court, into trust with the strata corporation, or has made other suitable arrangements.

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## 4. Loans from the CRF

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From time to time, a strata corporation's operating fund may have insufficient money to pay current invoices. Although most of our clients have enviable cash holdings, there are certain times of the year, or events, which give rise to a situation where the loonies run out and the only way to pay an invoice is to go into overdraft. Under the new *Real Estate Services Act (RESA)* a management firm ("brokerage") is not permitted to operate overdrafts (even if you, the strata council, wish to do so).

The *Strata Property Act* permits a strata corporation to borrow money from itself - meaning from its own Contingency Reserve Fund. Section 6.3 of the *Regulation* states:

### *Management of contingency reserve fund*

6.3 (1) *For the purposes of section 95 (4) of the Act, the strata corporation may only lend money in the contingency reserve fund to the operating fund if both of the following conditions are met:*

- (a) the loan is to be repaid by the end of that fiscal year of the strata corporation;*
- (b) the loan is for the purpose of covering temporary shortages in the operating fund resulting from expenses becoming payable before the budgeted monthly contributions to the operating fund to cover these expenses have been collected.*

*(2) The strata corporation must inform owners as soon as feasible of the amount and purpose of any loan made under this section.*

As noted above, use of the provision is generally not required but, if your operating account runs out of money, bills still have to be paid so we "borrow" money from the CRF. Once in a while a council member finds this practice to be unacceptable, often citing the concept that no authorization was given (by council) to spend money from the CRF. The difference is, of course, that borrowing CRF money is not spending it. The borrowed money is a loan and is repaid as soon as the operating fund builds up its cash position so that it no longer needs to borrow money.

Many strata corporations have funds other than the Contingency Reserve Fund from which they could conceivably borrow money. (Examples: leaky condo repairs, improvements, painting, roof,

etc.). The *Act* is silent in respect of the possibility of borrowing from such funds; however, VCS believes that the same restrictions and directions ought to apply.

VCS does all this automatically - that is what we get paid to do - and we do not issue memos or advisories to council in advance as it is mere routine. If you have any comments or questions concerning this practice, please feel free to let us know.

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## 5. Shuffling Money Around

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Recently we were asked if a strata council can take money from the strata corporation's Operating Fund (OF) to finance a shortfall in the amount of a painting contract. The painting contract was initially funded by a special levy pursuant to s. 108 of the *SPA*, but it could have been funded from the Contingency Reserve Fund (CRF) under s. 96 of the *SPA* if sufficient funds were in the CRF.

It is a common practice to use OF monies to fund contract shortfalls, but it should not be so. Here is why:

Looking to the governing statute, the BC *Strata Property Act* does not forbid the use of OF funds to cover CRF or special levy shortfalls, but the process of taking money directly from the OF to pay the cost of the shortfall is *procedurally* incorrect. The *proper* method is to move money from the OF to the CRF and then use the money to pay the shortfall. This is because spending from the OF (and for that matter the CRF) is limited to *consistent purposes* by the *SPA*.

According to s. 92 of the *SPA*, there are two distinct purposes for the OF and the CRF: The OF is for expenses (usually operating expenses) that are annual or more frequent. The CRF is for unusual expenses:

## 6. *Operating fund and contingency reserve fund*

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**92** *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.*

Section 96 of the *SPA* shows how expenditures are to be made from the CRF.

### *Expenditures from contingency reserve fund*

**96** *The strata corporation must not spend money from the contingency reserve fund unless the expenditure is*

*(a) consistent with the purposes of the fund as set out in section 92 (b), and*

*(b) first approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or authorized under section 98.*

As you can see, the requirement is that the expenditure be for a consistent purpose, for example an unusual expense like funding a painting contract shortfall (an unusual expense that is not annual or more frequent), which would be a clear CRF expenditure. Note that a  $\frac{3}{4}$  vote resolution is required to approve a CRF expenditure. If approved, the CRF can be used to cover the shortfall.

Expenditures from the OF are also subject to a  $\frac{3}{4}$  vote resolution under s. 97 (b) of the *SPA*, but there is a further requirement at 97(b) that “The strata corporation must not spend money from the operating fund unless the expenditure is...consistent with the purposes of the fund as set out in section 92 (a)”.

Section 105(2) of the *SPA* requires that deficits be eliminated during the next fiscal year, and under s. 105(1), surpluses must be either (a) transferred into the contingency reserve fund; (b) carried forward as part of the operating fund, as a surplus; or (c) used to reduce the total contribution to the next fiscal year's operating fund. The only exception would be the one allowed in s. 105(1): “unless the strata corporation determines otherwise by a resolution passed by a  $\frac{3}{4}$  vote at an annual or special general meeting”. This latter function could be used in situations

like a painting fund shortfall. If there is a surplus, the strata corporation may allocate, by  $\frac{3}{4}$  vote, a portion of the surplus to the painting shortfall; however, it is unlikely that the legislation was drafted with this in mind, so it is more appropriate that the money pass through the CRF. Monies from the CRF may be allocated (by  $\frac{3}{4}$  vote) to cover the shortfall, per s. 96 of the SPA.

From a purely technical perspective, a resolution to take money from the OF and apply it to the painting shortfall is permitted by s. 105(1) of the SPA, but an examination of s. 92 of the SPA shows that the proper use of funds in this sort of situation is move the money from the OF (or OF surplus) to the CRF by way of a  $\frac{3}{4}$  vote, and then to make the appropriate expenditure from the CRF to the painting fund, also by  $\frac{3}{4}$  vote.

To sum up, money to cover a shortfall in a contract for work that is not an OF expenditure can be allocated either from a surplus of the OF, or more properly, from the CRF in accordance with the SPA. In cases of huge shortfalls beyond the balance of the CRF, another levy could be proposed, which must be approved by a  $\frac{3}{4}$  vote resolution.

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