



## FEATURES THIS MONTH

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## 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. Oops

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Last month's financial statement newsletter contains an error. In the article: *Voting Under the SPA*, there is a line that says "Also, the number of votes in favour of a resolution must represent  $\frac{3}{4}$  of all votes of the corporation or there is a one-week waiting period ..."

The line should say "Also, the number of votes in favour of a resolution must represent at least 50% of all votes of the corporation or there is a ..."

## 2. Unit Entitlement

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Unit entitlement is the proportion assigned to each strata lot of:

- The strata lot share of ownership of common assets and common property of the strata corporation
- The strata lot share of expenses and liabilities of the strata corporation

When an owner developer files a strata plan at the Land Title Office, the strata plan includes a "schedule of unit entitlement" in form V to the *Strata Property Act*. The unit entitlement ("UE") for residential or non-residential strata plans can be a number that is the same for all strata lots, a number proportionally based on the size of each strata lot, or some other formula that the Superintendent of Real Estate considers equitable. For mixed-use stratas, the UE is an equitable number approved by the Superintendent. For residential stratas, UE includes living space but does not include storage rooms, parking stalls or patios. The number in all cases must be a whole number, so no fractions or decimals are allowed.

UE can be changed in one of three ways:

- If there is an error on the strata plan, such as a mistake in the measurements of a strata lot, a person can petition the Registrar of the Land Title Office to make an amendment;

- If the schedule of unit entitlement does not correspond to the habitable area of the strata lot and the difference is at least 10% of the lot size or 20 m<sup>2</sup>, application can be made to the Supreme Court of BC to amend the unit entitlement;
- If the owner of a strata lot increases the habitable area by at least 10% of the lot size or 20 m<sup>2</sup>, then they must increase the UE. Where the habitable area is decreased or not increased by 10% of the lot size and 20 m<sup>2</sup>, no change in UE in the schedule of unit entitlement is required. To increase UE, the owner first must obtain a unanimous resolution of the owners to allow the change in habitable area and UE, and create a new schedule of unit entitlement per the terms of the resolution that conforms to the requirements of the *Strata Property Act*. The owner must also submit a certificate of the strata corporation that states that the unanimous resolution passed and the new schedule of unit entitlement conforms to the resolution.

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### **3. When Is Maintenance A Significant Change?**

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The *Strata Property Act* contains at least two sections that bear on the role of strata councils and building maintenance. Section 71 states in part that the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless the change is approved by a  $\frac{3}{4}$  vote resolution or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage. Contrasted to this is Section 72 that states that the strata corporation must repair and maintain common property and common assets. When does maintenance become a “significant change”? That can be a difficult question to answer.

Two recent cases, one from Manitoba and one from Ontario, grappled with the question.

In *Briggs v. Winnipeg Condominium Corporation 30*, the council, for the corporation approved a complete window replacement for the building at a cost of over four million dollars. The building was more than forty years old, and there were 300 units in the building. The Manitoba *Condominium Act* requires corporations to maintain and repair common property just like the *SPA* does. It also requires a vote by the owners if a substantial alteration to the common property is proposed, with one significant exception.

The council acted on the strength of an engineering report that recommended complete window replacement. The contract was awarded without a vote by the owners. This was permitted under the Manitoba legislation, where the corporation can make any change in the assets of the corporation that is necessary to maintain the common elements in a state that complies with health, building, and maintenance and occupancy standards required by law, without a vote by the owners. In those circumstances the cost of the change is a common expense. A group of concerned owners got together and challenged the decision of their council, and raised a petition. The council refused to accept the petition, and went ahead with a special levy to be paid out over three and a half years, at around thirty-nine thousand dollars per unit. The court decided that while certain elements of the changes went beyond maintenance because the new windows were superior to the old ones, the project as a whole was not a substantial change since the windows were being replaced with other windows, and did not materially change the manner in which common property was used. The court asked if the work was maintenance, which did not require owner approval, or an improvement, which would be a substantial change and did require approval. The court decided as follows: "I am of the opinion that the essential purpose of the proposed work falls within the definition of 'maintenance' as used in the *Act*. The existing windows are ancient, obsolete and, if not wholly worn out, are in the process of wearing out. Broadly speaking, to maintain is to preserve and prevent a decline in the condition of a property. The only way to preserve and prevent a decline in the condition of the windows is to replace them... the work does encompass more than what is strictly required for maintenance." In the end the court decided the window replacement was maintenance and no owner's vote was required.

In *York Condominium Corporation No. 359 v. Solmica Chemical International Ltd.*, the issue was whether or not the replacement of windows in a commercial condominium building amounted to a substantial change. An owner opposed the replacement of the windows in the building because it was made without notice to the owners and without an opportunity to vote on the change.

The arbitrator appointed by the court found the condominium corporation has an obligation to repair or maintain units or common elements and if it does so using materials that are as reasonably close in quality to the original as appropriate in accordance with current construction standards, the work is not an “addition, alteration or improvement” under the Ontario *Condominium Act*. If the work is an addition, alteration or improvement, there are various procedural requirements that apply before the condominium corporation can undertake the work, including the need for a resolution and in some cases, the need for notice to the owners. If the addition, alteration or improvement is substantial, a majority of the owners must vote in favour of it.

After an analysis of the reasons for the window replacement and comparing the new windows to the old ones, the arbitrator concluded on the basis of the evidence before him that the window replacement work constituted repair and maintenance of the common elements, meaning the windows were in need of replacement. It was not an addition, alteration or improvement. He also concluded that the replacement windows were reasonably close in quality to the original. Because of this, no formal notice or vote of the unit holders was required, and the condominium board acted prudently and in good faith.

What conclusions can we draw from these decisions? If maintenance, no matter how major, is undertaken it falls within the scope of the strata council’s authority under s. 72 of the *SPA*. However, if the maintenance results in a substantial change to common property, then the owners must approve by  $\frac{3}{4}$  vote resolution. Despite the authority to commence maintenance without owner approval, it should be noted that there are additional safeguards to protect owners under the *SPA*. These are found in sections 96 to 98. These sections require non-budget expenditures from the contingency reserve fund or the operating fund to be supported by a  $\frac{3}{4}$  vote owner’s resolution if they exceed prescribed amounts, unless there is an emergency that requires immediate action. Even in emergencies, owners must be notified of expenditures as soon as it is feasible. In addition, the annual budget must be approved by majority vote at the AGM. So under

our legislation, a surprise four million dollar maintenance bill is unlikely to occur. Drastic measures like complete window replacement are paid for by a special levy or CRF expenditure, and either of those require a  $\frac{3}{4}$  vote owner's resolution.

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## 4. Requests For Proposals (RFP's)

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It is often the case that strata corporations need to hire contractors to perform work in their buildings. Major projects such as roof replacement, repiping or building envelope repair, to name just a few, are usually dealt with by way of a tender process to find suitable contractors offering a competitive price. The method of choice is the request for proposals or RFP. There have been many developments in the law of tendering, and an examination of some leading cases helps to illustrate the dangers that exist for the unwary.

In the 1981 case of *Ron Engineering*, the Supreme Court of Canada declared that in a tendering situation there are actually *two* contracts: the tender, and the main contract for the work. This is often referred to as the *Contract A, Contract B* model. The tendering contract comes into being in the following manner. First there is a RFP. This involves a description of the work to be done, the expected qualifications of bidders, and details of the selection process. This is considered to be an offer rather than an offer to treat or a request for offers. The acceptance of the offer is the tender, and the terms of the contract are the terms of the tendering process. The tendering terms usually include that the offers are irrevocable and that a deposit is required. The deposit may be the consideration or the offer itself may be, depending on the circumstances. Remember that creating a proposal takes time and effort by the potential contractor, and it has value. If a bid is accepted, there is a binding contract to enter into a contract for the work, in effect a "contract to contract".

Tender offerors also have a duty to accept the lowest compliant bid, unless they specifically say otherwise in the tendering terms found in the RFP. In *Kinetic Construction*, a BC Court of Appeal case, a regional district put out a call for proposals to build a sewage plant. There were numerous offers and the second-lowest offer was chosen because that company had a better reputation than

their cheaper competitor. This was despite the fact that the bid may not have been fully compliant. The court found that the offer was properly accepted, because the RFP contained terms that said that regional district could accept the tender which it deemed most advantageous to itself and could reject any or all tenders. The RFP also contained a term that the lowest or any tender would not necessarily be accepted, and that non-conforming tenders could be rejected or retained in the sole discretion of the regional district.

Despite the fact that a defective bid may be accepted if there is a term to that effect in the RFP, a losing bidder with a compliant bid may still sue on the grounds that if only compliant bids were accepted they would have received the contract, and the loss of the contract was actionable due to lost profits. In *MJB*, a Supreme Court of Canada case, the court found that the company would have received the contract if only compliant bids had been considered, and therefore they were entitled to damages.

A BC case dealing with strata corporations and RFP's is *Silex Restoration*. In that case, a strata corporation invited tenders for building envelope restoration. Several bidders made proposals, and a bidder other than Silex was selected. After discovering that the other bid was defective, Silex was selected, but the corporation was unaware of the fact that Silex also had put forward a defective bid. The RFP contained clauses stating that the owners could reject or accept non-conforming bids and had discretion to accept a bid that was not the lowest bid if it was advantageous to do so.

Shortly after offering Silex the contract, the strata corporation obtained an opinion from an expert on the work to be performed, and as a result revised the scale of the work so that it no longer conformed to the tender. The strata corporation informed Silex that they would not be proceeding on the work as ordered, and that there would be a new RFP and tendering process. Essentially the strata corporation cancelled the contract for the work. Silex sued on the basis that they had a binding contract once the tender had been accepted and the corporation had waived any defect in their bid. As the Court of Appeal described it, "Silex contended that the Strata Corporation had breached Contract A by refusing to sign Contract B, the contract for the remediation work, for reasons other than those contemplated by the terms of Contract A". The court of appeal accepted that normally a contract would come into existence once the tender had been accepted. However, because the bid by Silex contained a material defect (it is beyond the scope of this article to delve into the nature of the defect), no contract was entered into when

the tender was accepted, so there was no obligation to enter into the main contract for the work. If the bid by Silex had been compliant then the decision of the court would probably have been quite different.

What can we learn from the case law? Several things. First, RFP's and requests for tenders must be carefully drafted to allow the maximum amount of discretion for strata corporations to accept bids as they choose, which may not be the lowest bid offered and which may not be wholly compliant. There should be wording to the effect that the strata corporation can defer or cancel the proposed work. There should be some stated limit to the amount of money a tenderor can claim and this limit should be specifically included in the RFP. For example, the maximum limit could be set at the cost of preparing the bid. Finally, one option that many strata corporations use is to contract with an engineer or other competent expert to conduct the process of seeking, reviewing and accepting bids. This provides some protection in that the expert would be required to obtain insurance, and there is added protection in allowing this complex process to be conducted by someone with specialized knowledge and experience.

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**Ed. Note: The author has relied on two related articles by John Mendes of Lesperance Mendes Lawyers as a resource and inspiration: *Requests for Proposals: From Level Playing Field to Legal Minefield* and *The Law of Tendering: A Hidden Trap for Strata Corporations*. Both of these articles deal with the topic in a comprehensive and highly informative manner and are recommended reading. They can be found at the Lesperance Mendes Lawyers website <http://www.lmlaw.ca>, and are used with permission.**

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## 5. Enforcing Bylaws

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Strata councils are frequently faced with the issue of enforcing their bylaws and rules. Enforcement is necessary to govern the activities of owners, tenants and other occupants, and to prevent activities that can disrupt the harmony of the strata community. Sections 129 to 138 of the *Strata Property Act* deal with enforcement of bylaws and rules. These sections combined with the bylaws of the strata corporation describe how enforcement is carried out, the penalties imposed, and the rights of owners to answer claims of bylaw and rule violations.

One area that causes some confusion is the procedure for levying fines. Section 135 of the *SPA* describes this process, but sometimes it isn't followed. As a result, owners may successfully avoid paying fines that would otherwise be owed.

### **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, or
- (c) deny a person the use of a recreational facility for a contravention of a bylaw or rule unless the strata corporation has
- (d) received a complaint about the contravention,
- (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and
- (f) if the person is a tenant, given notice of the complaint to the person's landlord and to the owner.

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).

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.

Section 135 of the *SPA* requires that before the strata corporation imposes a fine against a person for contravening a bylaw or rule, it must have received a complaint about the contravention. However, council may also initiate the complaints process by taking notice of a contravention. Any complaint can be communicated to the strata council in any form. Following the complaint, the strata council must inform the owner or tenant *in writing*, and give the owner or tenant (whoever is the alleged offender) a reasonable opportunity to answer the complaint before a fine

can be levied. If complaint is about a tenant, the strata corporation must also give notice of the complaint to the owner/landlord. If the landlord and the owner are not the same person, then both the owner and the landlord must be informed. If the owner or tenant requests a hearing, the strata council must oblige.

Only after the tenant or owner has had an opportunity to be heard, and the council has provided its written decision, can they levy a fine under the *SPA*.

In the recent BC Supreme Court case of *Dimitrov v. Summit Square Strata Corporation*, the issue was whether the fines assessed for violating a pet bylaw were properly levied. Ms. Dimitrov had a cat in her apartment despite a bylaw prohibiting pets. The building manager notified her that a complaint had been made, and presented her with written notice of the complaint. No meeting of the strata council was held to consider the complaint, and the responsibility to levy the fine was merely passed to the property manager. The notice to Ms. Dimitrov stated that a fine of \$50 had been imposed against her as a penalty, and the "Animal must be removed A.S.A.P." Following this notice, additional notices of fines were left with Ms. Dimitrov for continuing contraventions of the pet bylaw, until the amount of the fines was \$500.

Ms. Dimitrov became suspicious of the fact that her fines had been improperly levied, and this formed one of the grounds of her court action to reverse the fines. The court agreed with her, saying that no meeting of council had been held to consider whether there had been a contravention of the bylaw, and Ms. Dimitrov did not have a reasonable opportunity to answer the complaint. The strata council simply imposed the fine *before* she was informed of her right to address council, and *before* she was given the opportunity to do so. The court found that the offer to address council that was on the notice of the fine was insufficient because by the time Ms. Dimitrov was offered a right to speak to the strata council the decision had already been made that she had contravened the pet bylaw and fines had been imposed. As a result, the court ordered the fines reversed, and ordered the strata corporation to pay \$500 to the owner.

What we can learn from this is that in order to fine an owner for a contravention of a bylaw of rule, the procedures outlined in s. 135 of the SPA must be strictly followed. Otherwise the strata corporation will pay the price.

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## 6. Where Is The Quote and Who Is To Blame?

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From time to time, our agent supervisors will check in with councils to ensure that they are pleased with the level of service provided by their strata agent. If there are any concerns expressed, VCS management has the opportunity to determine the proper resolution to any issues and to address concerns before they degenerate into outright problems.

One common response to these customer service “check-ins” is the complaint that there are often fewer quotes provided for projects than council feels are necessary, and there seem to be longer and longer delays in having work actioned. Many councils are routinely asking for three to five quotes for a specific, non-tendered job, and are having difficulty receiving even one. The quotes are often not ready in time for discussion at the next council meeting. Is the agent doing their job? The purpose of this article is explain that we are doing our jobs, but the desired results of our efforts are often difficult to achieve.

Generally speaking, your agent will produce the minutes the day after the council meeting and the work arising from the minutes will be actioned as directed by council, even as corrections to the minutes are taking place. This includes requesting quotations and confronting the ever-increasing difficulty in getting a response from the contractors. This point has been proven to council members who attempt to source a quote themselves, and to councils who create committees to undertake specific projects (such as a lobby or landscaping upgrade). They often find that it is just not as easy as calling up a couple of contractors and asking for a quote. It is often difficult to get a call back and very often the promised quote will take weeks to arrive. One such council recently advised they had their eyes opened to the difficulty in getting quotes and the attention of contractors after receiving two responses to fifteen requests to contractors for project quotes.

We have been writing about the impact of the labour shortage on contractor demand for a while, and there is no reason to expect a change anytime soon. The shortage in workers is expected to intensify in the coming years throughout the province and nationally. All major industries, including construction, tourism, retail, high-tech, trucking, and nursing are facing extreme labour shortages, due to the province's booming economy, the aging workforce, a shortage of qualified young people and competition from other employers. An article from the November 7, 2006 Vancouver Sun noted that by 2010 there will be over one million more job openings in all sectors, but there are only 600,000 students graduating from high school. None of this is good news for employers.

We will continue to do our best to source the requested quotes in timely a manner and we will try to get a completion date on projects from contractors wherever possible, with the knowledge that the date may very likely come and go. However, we all must realize that the process is, unfortunately, taking much longer than either strata councils or agents would like.

How is the strata management industry fairing during this labour shortage and all time low unemployment rates? Well, with mandatory licensing in place and just about no new agents joining the industry... that's another article.

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