



FEATURES THIS MONTH

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2. Bills Are Due.. No Money In The Operating Fund.. What To Do?
3. Money in the Bank
4. CRF Loans Require Authorization
5. Earth Hour

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. Council to Inform Owners of Minutes

That's the headline for bylaw 19 of the Schedule of Standard Bylaws of the *Strata Property Act*, which is virtually universal in strata corporations. Very few strata corporations have removed this bylaw from their own package of bylaws. The bylaw says:

“The council must inform owners of the minutes of all council meetings, within 2 weeks of the meeting, whether or not the minutes have been approved.”

The bylaw can pose huge problems for strata councils. For most meetings, the discussions are purely administrative and there are no confidential issues that emerge as hot topics. However, from time to time, some very confidential topics do arise and this raises a question as to whether or not the minutes are to be distributed to the owners.

In a recent financial statement cover page article, we advised our clients to be certain that any council discussions in between formal council meetings, which lead to decisions, be minuted at the next formal council meeting. The courts in British Columbia have established this protocol and we again remind our clients to follow this practice.

The question arises, however, as to the strata council's obligation to “disclose all” in their meeting minutes, which must be made available to the owners. Here are some examples of some topics which arise in strata council deliberations that might be considered as too sensitive to publicize:

- the strata council is facing a legal action by an employee (caretaker/manager) and the discussion centers around legal options or, possibly, a cash settlement or other solution to avoid the pending litigation;
- the strata corporation is involved in a complicated land negotiation with a neighbouring property and, once again, purchasing strategies need to be kept confidential;
- the strata corporation may be considering litigation against the developer for construction deficiencies. The developer still owns ten strata lots and receives the minutes of council meetings;

- an owner may be suing the strata corporation over some issue.

These are just a few examples of the kinds of issues that arise for which the strata council requires the protection of non-disclosure of its thinking and its decisions. How can they do this and still meet the requirement of bylaw 19?

They can't. As a result, strata councils simply ignore the bylaw and give minimal consideration to the implications.

In other instances, councils keep "in camera" minutes, meaning that minutes are prepared on the sensitive issue, but not distributed. This is a wise idea, although it still violates bylaw 19.

It has been suggested that, since bylaw 19 is a bylaw, the solution would be to amend the bylaw to either remove it altogether, or alter it to provide safe haven for the "in camera" minutes. Of course, this requires a $\frac{3}{4}$ vote of the owners to amend the bylaw and it would be virtually impossible to succeed in this initiative. The suspicion would be too monumental to overcome.

So what to do? Well, VCS cannot advocate "breaking the law" and that means that bylaw 19 must be honoured. A strata council can, however, choose to dedicate part of their meetings as "in camera" for the sensitive issues. This practice is "better than nothing."

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2. Bills Are Due.. No Money in the Operating Fund.. What To Do?

Occasionally, strata corporations are faced with cash shortfalls. These shortfalls can occur for a variety of reasons including under-budgeting, sudden operating expenses (insurance premiums are a timely example) or other unforeseen expenses that are incurred before the fiscal year end, large accounts receivables (arrears/uncollected strata fees). It is very important to keep in mind that the Operating Fund cannot go into overdraft at any time per the *Real Estate Services Act (RESA)*.

Additionally, according to Section 105(2) of the *Strata Property Act (SPA)*, any annual operating deficit must be eliminated during the next fiscal year.

The second issue regarding the annual operating budget deficit recovery can be accomplished by increasing strata fees or imposing a special levy next year. But what about the immediate need for money and the prevention of an overdraft situation?

To address this possible situation, Section 95(4) of the *SPA* allows that the strata corporation may lend money in the contingency reserve fund (CRF) to the operating fund as permitted by the regulations. *SPA* Regulation 6.3 stipulates that a strata corporation may lend money from the contingency reserve fund to the operating fund with the following conditions:

- 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.*

In summary, a loan from the CRF to the operating fund is allowed; however, it must be repaid within the fiscal year, it must be for the purpose of covering temporary shortages in the operating fund and the strata corporation must inform the owners of the amount and the purpose of the loan.

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3. Money In The Bank

From time to time, strata corporations are required to raise (relatively) large sums of money for major capital projects. You may already be familiar with the sections of the *Strata Property Act*, which gives the strata corporation authority to raise levies for specific projects:

- 108 (1) The strata corporation may raise money from the owners by means of a special levy.
- (2) The strata corporation must calculate each strata lot's share of a special levy
- (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
 - (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.
- (3) The resolution to approve a special levy must set out all of the following:
- (a) the purpose of the levy;
 - (b) the total amount of the levy;
 - (c) the method used to determine each strata lot's share of the levy;
 - (d) the amount of each strata lot's share of the levy;
 - (e) the date by which the levy is to be paid or, if the levy is payable in installments, the dates by which the installments are to be paid.
- (4) The strata corporation must
- (a) use the money collected for the purpose set out in the resolution, and
 - (b) inform owners about the expenditure of the money collected.

Examples of these projects could be re-piping, envelope repairs, re-roofing or interior renovations. Often, the price tag on these types of projects exceeds what an owner would be required to pay in strata fees over the course of a year. This can create a difficult financial situation for owners who are required to pay a large sum of money either up front in a lump sum, or over a period of time. Most people don't leave \$10,000 lying around for such eventualities, and strata corporations are often faced with decisions on how to stagger payment plans to accommodate the needs of owners while still satisfying their contractual obligations on these projects and complying with Section 108(3)(e).

Let's take an example from one of the strata corporations we manage, which is typical of the dilemmas faced by owners. At this strata corporation, the owners agreed to proceed with a program to replace various decks throughout the building, on the advice of an engineering firm. Several of these decks are actively leaking and there is the risk that others will as well. This type of work, which is heavily weather dependent, is best started in the spring and finished by the fall, otherwise there is the risk of postponing over the winter and having water ingress which will require further expenditures to repair the resultant damage. The strata council called a Special General Meeting in January to raise the funds required for this project and there was significant debate about how to handle the payment plans. The strata council proposed an 8 month payment plan, with payments beginning in February and finishing in September (winter through fall). The hope was that the strata corporation would have enough money in the bank over the summer to pay the major portions of the repair bills. There is a bell curve in payments with these types of projects, where the first few months are mostly preparation work by the consultant firm (small bills) and then the project ramps up in the middle while most of the major labour is performed (very big bills) and finally things slow down towards the end while minor details are finished (small bills again).

Several owners queried whether or not it would be possible to stretch the payment plan out, as long as twelve months (so that the final payments would be due in January of the following year). From a cash flow perspective this is impractical. Hopefully the work will be completed well before then, and the strata corporation (as is usually the case for large projects) does not have enough cash to supplement this fund in the meantime. In a worst case scenario, if the strata council were to extend the payment period, they could find themselves in default of their payment obligations to the contractor.

When bidding, contractors also like to know that the strata corporation is serious about its intentions to proceed. Many will refuse to participate in a formal tender process unless there is already money budgeted to proceed with the project. This may change in a softening market, but on large projects it usually costs contractors a significant sum of money just to put a bid package together so they will be hesitant to do so unless there is a reasonable prospect of being awarded the work. This is another reason why it is impractical to set aside payments until the end of a project.

The other significant reason for raising capital in advance of a project is that individual owners who are experiencing financial hardships will have a far easier time obtaining a loan. Most strata corporations have no assets to secure a loan with (the major exception being those strata corporations with a suite that is not already mortgaged) while owners have their individual suites and various other assets. Though we do not suggest that obtaining a loan would be easy for any owner, on a relative scale it is far more likely that owners could obtain loans to cover their shortfall than the strata corporation could to cover any payment shortfall.

We do not pretend that raising a special levy for major repairs is something that anyone would find palatable; however, sometimes it is necessary. On those occasions it is helpful to understand why payment plans are structured the way they are by the strata councils, with the input of the strata agent. It is crucial that the strata corporation has enough “money in the bank” to proceed on time and not get saddled with a large bill it cannot afford to pay.

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4. CRF Loans Require Authorization

Making “Loans” from Contingency Reserve Fund or Transferring Funds Between Trust Accounts Requires Express Authorization from the Strata Corporation

Questions have been raised by brokerages providing strata management services whether the borrowing of funds or making “loans” from a strata corporation’s Contingency Reserve Funds [CRF] (or from any other strata corporation trust account) requires express authorization from the strata corporation prior to doing so.

Section 3-3(1) of the Council Rules (see below), specifically items (1)(b) and (c), stipulates that a brokerage and its related licensees, when providing strata management services to or on behalf of a strata corporation client, must act in accordance with the lawful instructions of the strata

corporation (which are provided through its elected strata council) and only within the scope of the authority given by the strata corporation.

Duties to Clients

3-3 (1) *Subject to subsection (2), if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following:*

- (a) act in the best interests of the client;*
- (b) act in accordance with the lawful instructions of the client;*
- (c) act only within the scope of the authority given by the client;*
- (d) advise the client to seek independent professional advice on matters outside of the expertise of the licensee;*
- (e) maintain the confidentiality of information respecting the client;*
- (f) without limiting the requirements of Division 2 [Disclosures] of Part 5 [Relationships with Principals and Parties], disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate;*
- (g) communicate all offers to the client in a timely, objective and unbiased manner;*
- (h) use reasonable efforts to discover relevant facts respecting any real estate that the client is considering acquiring;*
- (i) take reasonable steps to avoid any conflict of interest;*
- (j) without limiting the requirements of Division 2 [Disclosures] of Part 5 [Relationships with Principals and Parties], if a conflict of interest does exist, promptly and fully disclose the conflict to the client.*

(2) By agreement between the brokerage and the client, one or more of the duties under subsection (1) may be modified or made inapplicable.

Section 30(1)(g) of the *Real Estate Services Act* (see below) allows a brokerage, based on a strata corporation client's instructions, to withdraw funds from a trust account maintained on behalf of that strata corporation.

Withdrawals from trust account

30 (1) *Money in a brokerage trust account, other than money that the brokerage holds as stakeholder, may be withdrawn only if it is one or more of the following:*

- (a) money paid into the trust account by mistake;*
- (b) interest paid in accordance with section 29 [interest on trust account];*
- (c) money authorized to be withdrawn under section 31 [payment of licensee remuneration];*
- (d) unclaimed money transferred under section 32 [unclaimed money held in trust];*
- (e) money paid into court under section 33 [payment of trust funds into court];*

- (f) money paid in accordance with a court order;*
- (g) money paid to or in accordance with the instructions of the principal to whose credit the money was deposited.*

In conjunction with the above, the Council Rules require that:

1. a brokerage providing strata management services must establish in its service agreement, the brokerage's scope of authority to sign cheques and make disbursements on behalf of its strata corporation clients [section 5-1(5.1)(c)(i)], and
2. the service agreement must include a brokerage's authority to transfer amounts between brokerage trust accounts maintained for the strata corporation under section 7-9(2) of the Council Rules [section 5-1(5.1)(b)(i)].

The Council, when investigating complaints or conducting an audit regarding a brokerage, will look at service agreements to determine a brokerage's scope of authority relative to withdrawals from or transfers between trust accounts.

There may be many different scenarios for which the borrowing or transferring of funds from one trust account to another may be required. One example is where a strata corporation has cash flow problems in its Operating Fund and requires a "loan" from its Contingency Reserve Fund [CRF]. Another example is where a strata corporation has a cash shortfall in a special levy account created by either unanticipated expenditures or unforeseen 'extras' which exceed the original levy budget, or due to unpaid special levies on the part of some strata lot owners. The strata manager would be acting outside of his/her scope of authority to unilaterally transfer or "loan" such funds from the CRF trust account to an Operating or Special Levy trust account in the absence of express authorization to make such a transfer or "loan".

It is, therefore, important for a strata manager and the brokerage to assess each situation carefully before proceeding with making such "loans" from or transferring trust funds between trust accounts. For those situations where the scope of authority is not established within the service agreement, the brokerage should obtain the express authority of their strata corporation clients, in the form of a separate written direction that clearly establishes the authority for the specific circumstance. Without the authority to "loan" or transfer funds, a strata manager may incur substantial risk and liability, as well as be subject to discipline under the Council Rules.

If there is uncertainty whether the authority provided for within a service agreement is sufficient, it is good business practice for a strata manager and the brokerage to minimize their risk and liability by obtaining a separate written direction that provides authority from the strata corporation client to make a “loan” from or transfer funds between trust accounts.

A brokerage should ensure that any parameters respecting its scope of authority to act on behalf of a strata corporation are either clearly established within its service agreement or provided by the strata corporation client, through its elected strata council.

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5. Earth Hour

Last year, several VCS managed buildings chose to participate in Earth Hour, an initiative of the [WWF](http://www.worldwildlife.org). We are happy to prepare notices, should you request them, to assist your building in participating in this very worthwhile cause. More information can be obtained at <http://www.earthhour.org/>