



## FEATURES THIS MONTH

1. Excessive Fines
2. Olympic Game Rentals
3. Excellent Articles to Read

## 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. Proposed Changes To The Strata Property Act

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Perhaps you saw the press release but, if not, see the next page. The provincial government plans to introduce changes to the *Strata Property Act*. The press release only highlights the scheme. For a full copy of the actual bill, go to [There is nothing in the Strata Property Act about excessive fines](#). Yes, there are provisions in the statute that limit the amount of a fine. Section 130 of the Act gives a strata corporation authorization to fine owners (or tenants) and Section 132(3) states that the fines must not exceed the maximum set out in the Regulation to the Act. As you know, the maximum fine for breach of a bylaw is \$200 and \$50 for a rule. (Rental bylaw violations allow fines up to \$500). The frequency of the fine for a continuing violation is “every seven days”.

This article is directed only at strata fees and special levies. Let’s say that your strata corporation passed a special levy which was payable on January 1<sup>st</sup> and the ¾ vote resolution included a fine provision of \$50 for late or non-payment of the levy. In our example, we will say that one owner’s levy was \$400 and he/she did not make payments for six months. Each month a fine of \$50 is added to the owner’s account so after six months the owner owes:

Special Levy	\$400
Fines (\$50 X6)	<u>\$300</u>
Total	<u>\$700</u>

The owner then pays but protests the fines. Council says “too bad”. Technically, and mathematically, the total is due fully in accordance with the ¾ vote resolution but are these fines excessive? As noted above, the *Strata Property Act* does not address this aspect; however, it is quite possible that a Court would find the fines to be excessive. Of course very few of these incidents actually end up in court because usually what happens is that the owner sells his/her strata lot and the fines are paid by the owner in order to obtain the Form F which is required. Just the same, councils need to be aware of these situations and be prepared to make adjustments in the context of fairness and reasonableness. That is not always very easy we admit.

Not included in the above consideration is the issue of whether or not a hearing was afforded to the owner for each of the fines that was imposed. Strata fees are due monthly and technically

each month, if there is non-payment, there is a new violation; therefore, a separate opportunity for a hearing is a requirement of the Act before a fine can be imposed.

A special levy payable over six months might be viewed by a court in a similar fashion. Conversely it may be argued that a special levy is a one time event; therefore, the monthly fine for non-payment is a “continuing contravention”; therefore, acceptable. Keep in mind, though, that a fine derived from a  $\frac{3}{4}$  vote resolution to raise a special levy is not a bylaw fine.

Complicated stuff right? Be careful: Be flexible. Keep out of court.

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## 2. Olympic Games Rentals

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With the Olympic season fast approaching, some strata lot owners may consider renting their strata lots. Questions arise from this practice concerning the insurance requirements that surround such rentals. This bulletin is not intended to provide legal advice or any assurance that the following model is a ‘guaranteed answer’ to the question. A strata lot owner that contemplates renting his or her strata lot should seek advice from their own insurance advisor or lawyer. We offer the following only as a general guide:

1. An owner’s unit (strata lot) and the common property are still covered exactly as it is normally in terms of the strata corporation’s insurance policy. Insurers expect that rentals are “part and parcel” of the activities that could be expected to take place in a strata corporation. Rentals during the Olympics do not fundamentally alter this expectation.
2. The *Strata Property Act* categorizes a tenant as a named insured.
3. An owner, however, should be concerned about a number of things if he or she rents the strata lot, such as:

- a) The strata corporation might have a large water damage deductible that would ultimately be charged back to the owner if the tenant caused damage to the strata corporation's property or adjacent strata lots.
- b) An owner's personal policy would likely exclude coverage for tenants and would have no cover unless the owner told the insurers and paid an additional premium.
- c) An owner would be personally protected as an owner under the strata corporation's liability policy for any event that takes place on common property but would need the personal policy to be modified to provide protection within the unit itself.
- d) If the tenant damaged the unit, the strata corporation's policy might not cover the damage; therefore the owner would be responsible. This may also be a problem under a personal policy.



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### 3. Excellent Articles to Reader

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This month our financial statement cover page material is comprised mostly of a copy of the March issue of Clark Wilson's *STRATAgies* . We urge you to read each of the articles as there is "really good stuff" here which you need to know. We extend our appreciation to the Vancouver law firm of Clark Wilson LLP for granting consent to VCS to use their material in our newsletter.

## **IGNORING FORECLOSURE PROCEEDINGS -WHAT NOT TO DO**

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In today's economy, many strata corporations are receiving notice from banks and other mortgage lenders (called "mortgagees") of proposed foreclosures on strata lots. The notice typically comes by way of a Petition to the BC Supreme Court. While many may set aside and ignore the Petition, it is not only very important not to do so, but doing so may also represent a lost opportunity for a strata corporation to collect monies owing by the strata lot owner.

Mortgagees, like strata corporations, have the power to apply to Court for an Order to sell a strata lot if an owner defaults on their mortgage. These proceedings are initiated by way of a Petition. The mortgagee is under an obligation to serve the Petition on anyone who has a registered charge against a strata lot. This would include a strata corporation if it has filed a Form G Certificate of Lien. However, without a Certificate of Lien, the mortgagee can file a Petition and is not required to give notice to the strata corporation. For this reason, it is important to ensure that a strata corporation file a Certificate of Lien with respect to any unit in arrears, even if the amount of lienable strata arrears is relatively small. Lienable strata arrears include strata fees, special levies, and interest on strata fees as long as there is a bylaw that allows interest to be charged to a maximum of 10% per annum compounded annually. If there are lienable strata arrears owing but no lien filed, the strata lot could be sold by Court Order without giving the strata corporation an opportunity to collect those arrears.



A strata corporation must ensure that its mailing address, as reflected in the records of the Land Title Office, is up to date. This is done by filing a Form D Strata Corporation Change of Mailing Address with the Land Title Office. Failure to file a Form D on the change of mailing address will result in the notice of legal proceedings being directed to the wrong address if the address is out of date.

Normally when there is a transfer in ownership of a strata lot, a Form F - Certificate of Payment must be filed with the transfer documents in the Land Title Office. When a strata lot is sold pursuant to a foreclosure, a Form F - Certificate of Payment is not required to register the change in ownership. The ability to change ownership without a Form F is the primary reason why it is important to ensure Certificates of Lien are filed very soon after an owner is in arrears and fails to respond to a demand to pay. In my view, and while there are no cases to date on the point, it is likely going to be extremely difficult, if not impossible, to collect arrears of strata fees or a special levy from the new owner if those arrears accrued prior to the transfer of ownership. Filing a Certificate of Lien ensures that the mortgagee becomes aware that the strata corporation is owed money and will have to be paid from the proceeds of sale in the foreclosure proceeding.

If the strata corporation is served with the Petition, this usually means that a Certificate of Lien was filed. However, if an owner was not in arrears at the time the Petition was started, the strata corporation may not become aware of the foreclosure Petition. While many mortgagees will give notice of the Petition to a strata corporation regardless of whether a Certificate of Lien is filed, they are not required to do so, and it would be imprudent to rely on such a practice. If an owner goes into arrears after the Petition is filed, it is not too late for the strata corporation to file a Certificate of Lien. Provided the Lien is filed prior to transfer of ownership of the strata lot in arrears, the strata corporation will have protected its priority claims.

It is not only important to ensure that a strata corporation makes a foreclosing mortgagee aware that it is owed money, it is also recommended that the strata corporation remain informed throughout the proceeding. The Petition may or may not include a statement setting out the mortgagee's position as against the strata corporation. I have seen many Petitions claim that the



mortgagee should be entitled to a higher priority position than the strata corporation. If the mortgagee were to obtain an Order that granted the mortgagee priority over the strata corporation, there may be no remedy for the strata corporation, which, having been served by the Petition, did not respond or appear in Court to fight the claim. In these circumstances, it is important for the strata corporation to review the Court applications (ideally with the assistance of legal counsel) to make sure that its priority position is protected.

To receive notice of each Court application, the strata corporation must file an Appearance in the Court. Filing an Appearance is simple, easy, and inexpensive. It is a form that sets out the address where all other Court documents can be delivered. After filing the Appearance, the mortgagee must serve to that address copies of any Court applications it will be making in the foreclosure proceeding. The strata corporation can then monitor every Court application to make sure that the mortgagee does not try to claim priority over the arrears that are subject to a Certificate of Lien.

In foreclosure proceedings, there are typically three Court applications. The first two applications generally do not affect the strata corporation. In the first application, called the Order Nisi application, the mortgagee obtains judgment and the Court grants the owner a fixed period of time (which is typically six months, but may be a much shorter period depending on the circumstances) during which he or she may pay the mortgage arrears and put an end to the proceedings. This is called the redemption period. If the owner does not pay the judgment with this period, the mortgagee will usually apply for an order for Conduct of Sale, which will allow it to market and sell the strata lot. Again, there is usually no reason for the strata corporation to have to respond to such an application. However, the third and final application is very important. This third application is the Order Absolute in which the Court approves an offer to purchase and sell the strata lot, and determines to whom and in what order the sales proceeds are to be distributed. This is the critical stage when a strata corporation will want to ensure that its priority position is protected, particularly if there will be insufficient sale proceeds to pay out all registered creditors. Sometimes, the mortgagee will apply for a Vesting Order, which gives the

mortgagee the ability to transfer the strata lot to itself and to cancel certain charges on title. Again, the strata corporation will need to review those court documents to make sure that the Certificate of Lien is not one of the charges being cancelled. If it is cancelled, the strata corporation will not be in position to enforce the security of its Lien in order to collect its arrears.

As a strata corporation may lose its most powerful tool to collect arrears of strata fees and other lienable charges, strata lot foreclosure proceedings by mortgagees must not be ignored by strata corporations or their management.

*Veronica Franco*

## **4. SMOKING IN STRATA CORPORATIONS**

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Many strata corporations are currently grappling with the issue of smoking in the condominium complex: should there be a non-smoking bylaw and, if so, whether there should be a complete ban on smoking not only on common property, but also in individual strata lots.

The new *Tobacco Control Act* imposes restrictions on smoking in public places, including parts of condominium complexes. However, this *Act* is not the only law that governs smoking in BC strata corporations. The following outlines some of the various ways that strata corporations can ensure that they comply with the various laws concerning smoking, while trying to minimize the infringement on any competing rights of owners who smoke.

### **Provincial Legislation: The Tobacco Control Act**

Effective March 31, 2008, new provisions in the BC *Tobacco Control Act* and *Regulation* ban smoking in indoor public spaces and workplaces. The purpose of this ban is to reduce tobacco use and the effects of second-hand smoke by ensuring that public spaces and workplaces are smoke-free.



According to section 4.21 of the Regulation, the following places are prescribed as places in which a person must not smoke tobacco or hold lighted tobacco: common areas of apartment buildings, condominiums and dormitories. Of particular note to strata corporations and their managers is that they are responsible for enforcing the smoking ban in common areas of the building, including elevators, hallways, parkades, and common rooms like reception areas and swimming pools, laundry rooms, and lobbies, or in the buffer zones three metres around public areas. The "three metre buffer zones" provide that one cannot smoke within three metres of an entryway, open window or air intake of a building area or an area that is substantially enclosed.

While the 2008 amendments to the *Tobacco Control Act* serve to ban public smoking, they do not apply to individual units, or to balconies in condominium or apartment complexes unless within the three metre buffer zone.

### **Municipal Bylaws**

In BC, some municipalities have enacted bylaws that are either similar to, or stronger than the provincial Tobacco Control laws, including Vancouver, Surrey, Richmond, and the Capital Regional District. Where municipal bylaws are stricter than provincial legislation, unresolved complaints should be made to the municipal bylaw enforcement department.

For example, Vancouver Health By-Law No. 6580 bans smoking in all public places. The Vancouver no-smoking zone is six metres of an entryway, open window or air intake of a building, while the provincial act only bans smoking within three metres of these areas. The Vancouver bylaw also imposes the duty on responsible persons to post no-smoking signs.

Depending on which municipality the condominium building is located, strata corporations and managers should check the local bylaws for applicable smoking rules.

## **The Common Law of Nuisance And The Strata Property Act**

In BC, the common law of nuisance deals with the use of property of one owner that interferes with a neighbouring owner's ability to use and enjoy their property. Section 3(1) of the Standard Bylaws in the *Strata Property Act* imports the law of nuisance into the bylaws of the strata corporation by prohibiting an owner, tenant, occupant, or visitor from using a strata lot or the common property in a way that causes a nuisance or hazard to another person. This can include smoking even if the strata corporation does not have a more specific non-smoking bylaw in place.

Drifting smoke from one unit into another unit can constitute a nuisance or hazard. This has in fact been tested by the courts, in the case of *Raith v. Coles*, a 1984 BC Supreme Court Case in which one owner complained of health problems caused by the cigar smoke from the downstairs neighbour. The smoke from the cigars came into the Raiths' apartment, causing nausea, indigestion, sore throats and emotional anxiety. The Judge found that the smoking had become harmful to others in the complex and granted an injunction stopping the neighbouring owners from smoking.

## **Human Rights Code**

The BC *Human Rights Code* can be used in two ways: it can assist the enforcement of non-smoking bylaws, but may require that a strata corporation accommodate the owner who is addicted to smoking.

To assist the enforcement of non-smoking bylaws, the *Human Rights Code* protects the rights of individuals who have a demonstrated allergy or sensitivity to second-hand smoke. An owner may be able to turn to the Code for protection if they have a disability that is exacerbated by second-hand smoke, and can take the position that the strata corporation has a responsibility to limit or ban smoking in order to accommodate the owner's disability.

On the other hand, there is support for the premise that nicotine addiction is within the meaning of physical disability under the Code. While there is no inherent right to smoke, smoking is still a



legal activity, as long as it is carried out in places where the smoke does not harm others. Therefore, smoking prohibition bylaws should only ban smoke in areas where non-smokers are put at risk, and the strata corporation should be mindful that they may have to accommodate people who are addicted to nicotine.

Unfortunately, to date, there are no cases reconciling the interests of persons with allergies to smoking with those of residents who have an addiction, leaving strata councils struggling to resolve smoking disputes. Addressing competing interests may require creative solutions, including such things as alterations to the ventilation systems of the building.

### **To Ban Or Not To Ban?**

Strata corporations and managers face the difficult task of balancing the competing interests of owners, while ensuring that they comply with the laws in place in the province.

What is clear is that there is now a positive obligation to ensure that public spaces are smoke free. While nothing in provincial legislation and applicable municipal bylaws imposes an obligation on a strata corporation to pass a bylaw to that effect, a strata corporation will be more easily able to discharge its obligation to enforce the ban on smoking in the identified public areas if a bylaw is formally adopted. The benefit of having something in writing, in the form of a bylaw, is that it makes it clear to owners where they are or are not allowed to smoke. Bylaws are registered in the Land Title Office, and as such, everyone is deemed to have notice of the bylaw, including persons who purchase a strata lot. Further, strata corporations then have the ability to enforce the bylaw and respond to complaints by imposing bylaw infraction penalties under the *Strata Property Act*, including fines.

And while an outright ban on smoking, including in individual strata lots, may not be necessary, or, for that matter, easy to pass, the law of nuisance provides protection for owners from second-hand smoke in specific instances where they can demonstrate they are personally being negatively impacted by someone else smoking.

[Kristine All](#)

## 5. SECTION 144 HARDSHIP

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Based upon the calls we get from managing agents, strata councils and owners, it is clear that an exemption from complying with a rental restriction or prohibition bylaw is a misunderstood concept of the *Strata Property Act* and one that causes a great deal of angst among neighbours. It must be acknowledged that, if an owner is making a claim for hardship, renting their lot would otherwise result in a contravention of the rental restriction bylaw - hence the request to be exempted. Those strata councils that are automatically refusing hardship requests because the strata corporation has passed a bylaw restricting or prohibiting tenants are unreasonably refusing hardship applications.

The ability of a strata corporation to pass such bylaws is unique - the *Act* provides that an owner can be limited in their dealing with their own lot by limiting an owner's right to rent. To counter this significant limitation, the *Act* further provides an owner may apply for an exemption and the response of the council and managing agent is subject to very stringent deadlines and procedures. Section 144 of the *Act* requires the owner to make the application in writing, stating the reason for the exemption request and whether the owner wishes a hearing.

If the owner wishes a hearing, then that hearing **MUST** take place within three weeks of the receipt of the application. It is not good enough for the council to say that it will hear the application at their next council meeting. If the hearing is not heard within the three weeks, the exemption is granted automatically. Once the hearing takes place, a decision must be given in **WRITING** one week after the hearing, or the exemption is allowed.

If an owner does not request a hearing, then the Council **MUST** give the owner its decision on the request within two weeks of receipt of the request, failing which the exemption is automatically granted. (Note: If requests are being sent to property managers on behalf of the Council, the "clock" starts ticking when the property manager receives the request, not when the request is ultimately forwarded on to the Council).



Can the council be "wrong" whether hardship exists and the decision still stands? Absolutely, but the wrong decision still must be one that can be justified. Councils are not perfect. However, the *Act* states that the strata corporation must not unreasonably refuse to grant an exemption. If you haven't figured it out by now, let me underscore that the process is key. Requests must be in writing, not delivered verbally in the hallway. Deadlines must be met. Decisions must be in writing. Councils must give the owner making the request a fair hearing. To be "reasonable", decisions rejecting the appeal must give reasons, and it better not be "Because we don't want renters".

What constitutes hardship? You can ask a lawyer at Clark Wilson. You can ask the managing agent. You can ask your mother. None of those are overly helpful. It is the decision of the council that prevails, the decision of those that are present and conduct the hearing. The Courts have stated that the question of hardship must be tested by the facts of the particular case. We do know that the *Act* does not provide a definition. We also know that a bylaw that requires "undue" hardship to be proved is unenforceable. The Courts have held that the inability to sell a lot is insufficient on its own to necessarily show hardship. However, any attempt to lay down hard and fast rules of hardship is unreasonable as the council would be exhibiting inflexibility.

In conclusion, acting as a council member addressing hardship is itself hard! Council members must meet tough deadlines, provide a fair hearing knowing that the owners collectively have voted in significant numbers to restrict rentals, ask questions (including requesting further information and documentation if the material submitted does not support the reasons advanced for the request) and consider answers, and give a very quick reasoned decision in writing. The eventual response may be far reaching - however, it is NOT precedent setting. To repeat, each hardship application must be tested by the facts particular to that case. Good luck!

[Pat Williams](#)