

LIMITED COMMON PROPERTY:

What is it, How does it work and Who is Responsible?

Owners of strata lots frequently are “given” or “sold” property to use which is not part of their registered strata lots. Although the new *Strata Property Act* gives “exclusive use” rights to owners at section 76, it is not a designation of limited common property. More frequently than not, the designation and creation of limited common property is done by the developer rather than by the owners pursuant to a (special or ¾ vote) resolution of the strata corporation. Developers utilize the concept generally as a marketing device since it allows them to take common property and sell it – a truly remarkable feat. Common law has established that one cannot sell what one does not own, yet in strata corporations developers routinely take common property which belongs to all the owners of strata lots (not the developers) and sell it by the simple act of designating it as limited common property. Remember throughout the following discussion that limited common property is and remains common property of the strata corporation. The only focus, therefore, is on the word “limited”. What does that mean and what are the consequential effects of creating this “limitation”?

Common property is defined by the *Strata Property Act* and it means “(a) *that part of the land and buildings on a strata plan that is not part of a strata lot,...*” The definition (found in the Definitions and Interpretation section of the Act) also recognizes that there are common property components within and between individual strata lots and other strata lots or common property. For example pipes, wires, cables, chutes, ducts etc. are considered common property and the responsibility, therefore, of the strata corporation to replace, repair, insure and maintain. The definition of limited common property is remarkably simple. It is “*common property designated for the exclusive use of the owners of one or more strata lots.*” It is usually just for one owner but it could also be for the exclusive use of more than one strata lot owner although in most applications this would not be the case. Note, however, that the definition does not contain any hint of who is responsible for the associated costs. For that, one has to analyze each specific application, interpret the statutes (the *Condominium Act* to June 30, 2000 and the *Strata Property Act* from July 1, 2000) and look also to the Regulation of the S.P.A.

Here are some common examples of limited common property:

- (a) parking stalls;
- (b) patios or balconies adjacent to a strata lot;

- (c) roof decks

Here are some uncommon examples of limited common property:

- (a) fireplaces;
- (b) elevators (usually for a penthouse suite);
- (c) storage lockers;
- (d) recreational areas, such as a putting green

(Note that it is rare to see a strata plan designate a fireplace and associated chimney as either common property or limited common property. If it is not designated on the strata plan, it should be assumed that the fireplace is part of the strata lot and the chimney flue is common property.)

Wherever limited common property is found on a strata plan, in the vast majority of applications the designation of the exclusive use is attached to only one strata lot. It is rare to see limited common property attached to more than one strata lot even though the definition suggests that this is possible. The *Strata Property Act* permits a strata corporation, at Section 74, to designate areas of common property as limited common property provided:

- (a) a $\frac{3}{4}$ vote resolution is passed; and
- (b) the resolution is filed in the appropriate land title office for the strata corporation.

(The strata corporation does not have to amend the strata plan (74(4)) although, if the developer creates, i.e. designates, limited common property, the plan does have to be amended (73).)

Because of the contentious nature generally associated with designating common property for one or more strata lot owners as LCP, it is quite unusual to see strata corporation owners adopt this practice. There is a strong notion that "common property is common property" and should be owned by all the owners and not be "given away" to a small group of owners or just one owner. In the event that a strata corporation does create limited common property for an owner, it can be removed by the owners by a $\frac{3}{4}$ vote resolution (and the resolution must be filed in the land title office). If the creation of the limited common property was done by the developer, the removal can only be done pursuant to Section 257 which, among other things, requires a unanimous vote of the owners. Clearly a unanimous vote is very difficult to achieve and a strata lot owner who obtains a parking stall or other area of limited common property as a consequence of the developer's actions, has a very good chance of retaining the limited common property. (The *Strata Property Act* has

introduced a new concept at Section 52, Unanimous Votes, which effectively means that unanimous may be something less than unanimous. Readers should review the provisions of Section 52.)

Section 76 of the *Strata Property Act* (Short Term Exclusive Use) is also a new concept to condominium administration; however, it does not follow the same principles of limited common property, notwithstanding its intention of creating exclusive use of common property or common assets. It is a simple mechanism for short term use only and the control of the designation is left with the strata council. In the context of this paper, therefore, section 76 is not considered relevant.

To summarize what I have said so far:

- (a) limited common property is common property;
- (b) the limitation creates exclusive use for an owner;
- (c) the Act provides no direction on responsibility for care, maintenance or repair of the limited common property; and
- (d) the overwhelming application of limited common property use is by developers at a marketing stage rather than by creation by the subsequent owners of a strata corporation;

Having created limited common property, the question then arises as to who is responsible for the care, maintenance, repair and replacement of limited common property. Before one can answer that question, some analysis is required. Designations of limited common property are invariably two dimensional. When examining a limited common property designation on a strata plan, or on a "sketch plan" pursuant to section 74 of the *Strata Property Act*, the only description is two dimensional. The designation is never "turned on its side" to provide a three dimensional view and for this reason the application of limited common property and its resultant obligations must be considered as superficial only. One could argue that this was merely an oversight by the drafters of the legislation although it could be argued in the alternative that this is exactly what the drafters intended. They wanted a superficial assignment and did not intend to literally give any depth to it. In other words, the goal of creating exclusivity pertains only to its use – that is to say its access, its privacy and protection from trespass by persons other than the holder (and other than as provided to the strata corporation by the statute for legitimate purposes). Its possession by the holder is to use as the sole tenant not as a joint tenant. The Act is silent on the topic of who should pay for repair and maintenance of limited common property. Section 72 Repair of property dictates clearly that the strata corporation is responsible for common property and, only if a by-law is created, can the strata corporation make an owner responsible for the costs associated with repair and maintenance of LCP. The Act provides by-law 8 for this purpose. Thus, if one accepts the premise that the

designation of limited common property, be it for a parking stall, or a roof deck, or a balcony, or a private elevator, is only to grant exclusive use, a strata lot owner should not, therefore, be responsible for the costs of repairs and maintenance of that limited common property unless a bylaw has been created. It may be reasonable to expect the holder of such limited common property (without a bylaw) to provide superficial custodial services but certainly nothing more.

Thus, in the example of a property with wood decks (LCP) cantilevered from the main building, the liability to repair and maintain (including replace or reconstruct as in leaky condo syndrome) is the statutory responsibility of the strata corporation not the strata lot owner. Thus, in the example of a roof top patio deck (LCP) which in reality is the common property roof of a strata lot below, the liability to repair the roof, or replace it if necessary, is the statutory responsibility of the strata corporation, not the strata lot owner with the deck. Thus, in the case of a "private" elevator (LCP) the cost to repair and maintain the elevator is the statutory responsibility of the strata corporation, and not the strata lot owner enjoying the private ride up and down.

All well and good, but is this the end of the story? What about by-laws to the statutes?

The *Condominium Act*, at Section 128, provided a bylaw which has been relied upon widely to apportion costs to holders of limited common property. In the familiar examples cited above, most strata councils could understand the rationale of the strata corporation paying for deck replacements and roof repairs, but elevator maintenance? That's a hard one to swallow. Accordingly, relief was often sought from by-law 128 (Common Expenses) of the *Condominium Act* in some of these situations; however, it may not be as easy as it appears. Subsection (2) of 128 refers to "types" of strata lots but not to limited common property. This subsection is, therefore, of no use. (It would be stretching the point to suggest that one or more strata lots that have LCP components are different types as compared to those strata lots that do not have the identical LCP components.)

Subsection (3) of 128 refers specifically to limited common property and states in part that "*expenses attributable to the limited common property which would not have been expended if the area had not been designated as limited common property must be borne by the owners*" benefiting from it. In the examples I have cited it is clear to me that costs for repair and maintenance of cantilevered decks, roof decks and elevators would have been "normal" expenses to the strata corporation whether or not any exclusive use benefits (i.e. LCP) were granted. In essence, therefore, bylaw-128(3) of the *Condominium Act* should rarely be

utilized to transfer expenses associated with limited common property onto the shoulders of strata lot owners from the strata corporation. It may be quibbling but additionally note that 128(3) starts off with the phrase "*If a strata plan includes limited common property...*" This suggests that the by-law is only applicable if the developer designated limited common property pursuant to section 53 and that it does not apply to a subsequent designation by a strata corporation (i.e. the owners) since it does not (under the *Condominium Act*) have to amend the strata plan. (Nor does it under the *Strata Property Act*.) In any event, it is my view that the key phrase in 128(3) is "*if the area had not been designated as limited common property*". This suggests that only very specific circumstances should give rise to charging an owner an expense rather than it being paid for by the strata corporation. Indeed, few examples come to mind. A roof deck, if it were not designated as LCP, would still be a responsibility of the strata corporation. A parking stall, if it were not designated as LCP, would still be a responsibility of the strata corporation. And so on. I am hard pressed to think of building components that would qualify as not being the responsibility of the strata corporation and it is for this reason, I submit, that the concept of LCP as envisioned by the *Condominium Act* is only to the extent of usage and exclusive territory, not to the transfer of responsibility for associated costs to repair and maintain.

In the new *Strata Property Act*, the legislators improved the language of the *Condominium Act* by-laws and have addressed the domain of responsibility by the creation of by-law 8. The by-law states that the strata corporation remains responsible for the repair and maintenance of limited common property but recognizing that there are likely to be day-to-day housekeeping matters it first restricts this liability to issues that "*in the ordinary course of events occur(s) less often than once per year*". Thus, if a drain on an LCP deck is plugged with dirt, leaves etc, the strata corporation is not responsible to "repair and maintain". An oil spillage on an LCP parking stall is similarly a housekeeping item and is also not the responsibility of the strata corporation. What about painting a wood (LCP) deck? That is not something done ordinarily every year; it is likely done "less often than once a year" and is therefore the responsibility of the strata corporation. What about cleaning the fireplace chimney? Assuming it is designated on the plan as LCP (which is rare) if it is done "less often than once a year", the owner is not liable. If it is done once a year (or more frequently), it would appear to be the responsibility of the strata lot owner. This liability, however, would not be applicable if the strata plan does not show the chimney flue to be by the LCP. In actual fact, it is extremely rare to see chimneys designated as LCP. The bylaws of the new legislation, however, address the matter of chimneys and they are included as a responsibility of the strata corporation.

What about the LCP private elevator? If the mechanical parts of the elevator fail, it is reasonable to conclude that this occurs "less often than once a year" so the owner is not liable. What about the monthly service program for the elevator? This is not "less often than once a year" so it is the responsibility of the owner not the strata corporation. Now we have a clear change in responsibility as outlined in the *Condominium Act* by-laws and the *Strata Property Act* by-laws.

The new Act by-law goes on with even further clarification. It recognizes that certain components of a property, even if designated as LCP, should remain the responsibility of the strata corporation to repair and maintain "no matter how often the repair or maintenance ordinarily occurs". It is specific:

- (a) *the structure of the building;*
- (b) *the exterior of the building;*
- (c) *chimneys, stairs, balconies and other things attached to the exterior of the building.*
- (d) *doors, windows and skylights on the exterior of a building or that front on the common property*
- (e) *fences, railings and similar structures that enclose patios, balconies and yards.*

This is a wide ranging description of building components and it is very specific and inclusive. There can be no doubt with this by-law that, despite the designation of these components as LCP, the responsibility to repair and maintain is that of the strata corporation. It is most unfortunate that this is a by-law and not a statutory provision, since by-laws can be changed by the owners (although it is unlikely that the by-law would be changed since a $\frac{3}{4}$ vote is required).

Regulation 6.4 of the *Strata Property Act* must be considered in this discussion. It is called Formulas for sharing operating expenses for limited common property and types of strata lots.

The calculation of strata fees is established at Section 99 of the *Strata Property Act* and the formula is identical to that of the *Condominium Act*.

It is:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

ie.
$$\frac{50}{6300} \times \$190,000 \text{ (annual budget of strata corporation)}$$

Total strata fee = \$1507.94 annually
Total strata fee = \$ 125.66 monthly

Regulation 6.4 provides mechanisms for further calculations, as follows:

- (1) where limited common property is involved
- (2) where a different "type" of strata lot is involved (and that type is identified in the by-laws)
- (3) where the Contingency Reserve Fund is involved.

The only relevant component to this paper is subsection (1). Again, I maintain that it is inappropriate to suggest that LCP mechanisms be invoked on the basis of different types of strata lots. More on this point in a moment.

Therefore, Regulation 6.4(1) is applicable in calculating additional fees for strata lot owners benefiting from the designation of limited common property. Where an expense is identified as being associated with LCP the formula becomes:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots whose owners are entitled to use the limited common property to which the contribution relates}} \times \text{contribution to operating fund}$$

Take the example above and assume that the cost to service the private elevator for one owner is \$2,400 per year. The owner's strata fees would be calculated as follows:

Annual Budget	\$	190,000	<i>(all owners)</i>
Less private elevator (LCP)		<u>2,400</u>	<i>(one owner)</i>
	\$	187,600	<i>(all owners)</i>

$$\text{Step 1: } \frac{50}{6300} \times \$187,600 = \$1488.89 \text{ annually} \\ \$124.07 \text{ monthly}$$

$$\text{Step 2: } \frac{50}{50} \times \$2,400 = \$2,400 \text{ annually} \\ \$200 \text{ monthly}$$

Total strata fees for owner = \$3888.89 annually *(Steps 1+2)*
 \$324.07 monthly

Let's assume that two strata lot owners benefit from the private elevator. The fees would be calculated as follows:

$$\text{Step 1: } \frac{50}{6300} \times \$187,600 = \$1488.89 \text{ annually}$$

6300 \$ 124.07 monthly

$$\text{Step 2: } \frac{50}{100} \times \$2,400 = \$1,200 \text{ annually} \\ \$100 \text{ monthly}$$

Total strata fees for owner = \$2688.89 annually
\$ 224.07 monthly

The issue of "types" of strata lots needs examination. As mentioned earlier in this paper, Section 128(2) of the *Condominium Act* refers to types, although nowhere in that statute or its standard by-laws was there any definition or characterization of the expression. The *Strata Property Act* refers to different "types" of strata lots at Section 191, Sections allowed. In the *Condominium Act*, at Section 51, a strata corporation could create sections to distinguish the different interests of residential strata lots and non-residential strata lots. The *Strata Property Act* goes further: it not only provides a similar mechanism for residential v. non-residential strata lots, it also permits, at 191(1)(c) separate sections for the owners of "different types of residential strata lots". The different types of residential strata lots are set out in regulation 11.1 and they are:

- (a) apartment-style strata lots;
- (b) townhouse-style strata lots;
- (c) detached houses.

The characterization is precise and it is quite narrow. This is very important as some argument has been advanced, in the context of the limited common property issue, that strata lots are different if other unique qualities distinguish them from the mainstream. For example, strata lots that have fireplaces might be identified as a different type of strata lot from those that do not have fireplaces. The list can be endless and perhaps even silly, such as those with a view v. those without. The new regulation has eliminated the wide ranging application of the concept. What must also be remembered is that, even if different types of strata lots can be identified, pursuant to regulation 11.1, the application can only be used in strata corporations where sections have been created, pursuant to Part II – Sections of the Act. The application cannot be used elsewhere. In the context of limited common property, different types of strata lots is not relevant.

CONCLUSION

Limited common property is common property and the Act mandates that the strata corporation is responsible for common property. The Act does

not make the strata corporation directly responsible for the repair and maintenance of limited common property; however, by means of the standard by-laws to the Act, the strata corporation is charged with duty but the duty is restricted both by frequency requirements and by component. The net effect is that most common components of LCP are excluded and, where they are included, it is only to the extent that they occur less often than once a year. The resulting consequence of this is that a strata lot owner enjoying the benefits of an LCP designation is likely to be responsible in most instances for nothing more than custodial functions. It should be rare that a strata lot owner benefiting from an LCP designation would have to pay for repair costs.

One last point: the by-laws of a strata corporation are amendable. They are not cast in stone as is the statute; thus, a strata corporation could amend the by-laws if it so desires. Strata corporations registered in a land title office after July 1, 2000 will automatically inherit the *Strata Property Act* standard by-laws and strata corporations registered in a land title office prior to July 1, 2000 will only inherit the same by-laws on January 1, 2002 providing the strata corporation has not previously filed a conflicting by-law. If it has, the filed by-law is superior.

BUILDING ENVELOPE REPAIR REGULATIONS

- After September 30th, repair contractors will have to be licensed by the Homeowner Protection Office and provide a mandatory, third-party warranty in order to get a building permit for applicable building envelope repairs.
- These regulations do not apply to the following categories:
 - Buildings with only one or two self contained dwelling units.
 - Hotels and motels.
 - Dormitories, care facilities or floating homes.
 - Repairs carried out by the original builder at no cost to the owner.
 - Buildings covered with Homeowner Protection Act legislated warranty insurance.
 - Buildings with repair costs less than a total of \$10,000 or \$2,000 per unit in the building.

Licensing:

- After September 30th, a repair contractor must be licensed as a building envelope renovator by the Homeowner Protection Office in order to engage in, arrange or manage building envelope renovations.
- In order to get a building permit for repairs, repair contractors must prove that they are licensed and that the home to be repaired is covered by a third-party warranty.
- Building envelope renovator license fees are \$100 for licensed residential builders, otherwise the fee is \$600. An additional \$25 per unit is also charged as part of the licensing fee. Annual renewal fees are \$500 (only one \$500 renewal fee is required for those acting as both licensed residential builders for new construction and licensed building envelope renovators). An additional \$25 per unit is charged as part of the renewal licensing fee. Licensing fees fund the program areas of the Homeowner Protection Office (licensing, research and education and the reconstruction program).
- Building envelope renovators must complete a renovation schedule and provide it to the strata corporation / owner(s) before applying for a building permit.

Repair Warranties:

- After September 30th, repair contractors applying for building permits to repair building envelopes must provide a third party warranty by an insurance company approved by the Financial Institutions Commission and meet the requirements of the Homeowner Protection Act and regulations.
- Minimum coverage and standards for repair warranty insurance are now set by regulations. Minimum coverage will always include two years on labour and materials. If 60 per cent or more of any wall is replaced, an additional five-year warranty on water penetration is provided.
- At the request of the strata council / owner(s), a dispute with the warranty insurance company can be handled through mandatory third-party mediation.

For more information, visit the Homeowner Protection Office website at www.hpo.bc.ca and the Ministry website at www.gov.bc.ca/sdes/. The HPO office telephone is 1-800-407-7757.