VISOA
Vancouver Island Strata Owners Association

- 306 - 620 View Street, Victoria, B.C. V8W 1J6
- General Office Email: information@visoa.bc.ca
- Office Telephone: (250) 920-0688 or 1-855-38VISOA (1-855-388-4762)
- Helpline: 250-920-0222 or 1-877-33VISOA (1-877-338-4762)
- Web site: www.visoa.bc.ca

VISOA Bulletin - FEBRUARY 2014

Breaking the deadlock

By Shawn M Smith, B.A., LL.B

An all too familiar scenario which has played itself out in various strata corporations is one in which repairs (be it to pipes, the roof or the building envelope) are desperately needed but cannot be done because a resolution approving a special levy to raise the required funds cannot be passed. Thus far the only solution to that scenario (other than calling yet another general meeting in the hope that someone will change their mind) was for one or more owners, at their own expense, to go to court and ask the court to approve the resolution imposing the special levy and authorizing the work to be done. In most cases the court would do so since it was clear the repairs were needed and the failure to do them put the strata corporation in breach of its duty under s.72 of the Strata Property Act to repair and maintain the common property. With the recent "proclamation into force" of s.173(2) – (4) of the Strata Property Act, things have changed.

Sections 173(2) – (4) were passed as part of the Strata Property Amendment Act in 2009. However, they were not in force until December 12, 2013.

Those sections provide that:

(2) If, under section 108 (2) (a),

(a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and

(b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2) (a),

the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.

(3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.

(4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the strata corporation may proceed as if the resolution had been passed under

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section 108 (2) (a).

In short, if the strata corporation puts forward a resolution to approve a special levy to carry out repair work and the resolution receives between 51% and 74% approval, the court, on application of the strata corporation, can choose to approve the resolution.

There are some important things to note about this provision, however. Firstly, given the reference to s.108(2)(a), it applies only to a resolution to pass a special levy. It does not apply to a resolution to borrow money or to spend it from the Contingency Reserve Fund. Secondly, the resolution in question must relate to repairs to the common property that are necessary to ensure safety or to prevent significant loss or damage. Beautifying the lobby doesn't count. (Although the language here mirrors that of s.98(3), there is no restriction that the sum to be raised be the "minimum amount" necessary to ensure safety). Lastly, the application to the court must be made within 90 days of the defeat of the resolution.

The order which can be sought under s.173(2) is discretionary. In other words, the court does not need to approve it simply because the strata corporation applied for approval and the resolution received more than 51% support. The court may look at some of the same factors it does when it considers an application by an owner for an order approving the levy. Primarily the court will need to be convinced (potentially by way of expert evidence) that there is a safety issue or that significant loss or damage may occur. If that hurdle cannot be overcome, then no order can be made.

The question which has been left unanswered by the amendment is what type of approval is required to bring such an application? S.171 of the Strata Property Act requires approval by way of a ¾ vote before a strata corporation can commence any type of court proceeding (one notable exception to this rule is a petition under s.117 of the Strata Property Act to enforce a lien). Recently in The Owners, Strata Plan BCS3699 v. 299 Burrard Developments Inc. 2013 BCCA 356, the Court of Appeal confirmed that the ¾ vote requirement of s.171 applied to an application brought under s.173 (as it read before the enactment of subsections (2) – (4)).

However, is that what the Legislature intended when it passed the amendments? Arguably not. If the resolution approving the special levy can't achieve a ¾ vote, how would a resolution to seek court approval which requires the same margin of approval pass? In the writer's view, the intention was to permit the strata corporation to bring the application without approval of the owners. The decision in 299 Burrard puts that in question.

However, the Court of Appeal in 299 Burrard may have left open a way around that problem. In its judgment the court said the following about the recognized exceptions to the ¾ vote requirement of s.171:

"Both ss. 171 and 173 deal with summary procedures, whose intent is inconsistent with requiring the authorization of a sizeable majority of the owners."

An application under s.173(2) arguably falls within that same scope. Requiring a ¾ vote to seek approval of a resolution that failed to achieve a ¾ vote makes no sense. The purpose of s.173(2) is clearly to avoid a small group of naysayers standing in the way of needed repairs. If a ¾ vote is required to seek approval of that same resolution by the court, that same group of naysayers could defeat such an application and the strata corporation would be no better off than before the enactment of s.173(2).

How often strata corporations will resort to s.173(2) will remain to be seen. Will there be that many resolutions that fall within the scope of s.173(2)? Will strata corporations be willing to spend the money to seek such approval? However, where there are deadlocks, the amendments do provide a valuable option for breaking them.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for a variety of strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.

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Please include your name, strata number and telephone number. Letters and emails may be published on-line.

A Disaster Averted

A first-time home buyer's thank you to VISOA

By Linda Howie

We've all heard the old adage "If I'd known then what I know now…". I realize now that when my husband and I were shopping for our first home, a condo, we knew almost nothing. I'd read Mike Holmes "Holmes Inspection" and I thought we were prepared with some basic knowledge about buildings but we were clueless as to the other side of the equation. We did not even know that the Strata Property Act existed.

Fast forward to the exciting day that our offer was accepted on a condo in Victoria. We had diligently pored over all of the minutes and bylaws. But there was one hitch – there was an age restriction and my husband was one and a half years too young. We wrote a nice letter to the strata council requesting an exemption but were denied. We were devastated. Our realtor presented an option that was a workaround. He said I could buy the condo in my name only and rent a room to my husband. He said that the Residential Tenancy Act and the Human Rights Code of BC made it legal. I kept saying that it didn't sound right and so I launched myself into the legalese of these and the SPA.

Now here's where it gets interesting. A council member caught wind of this, called VISOA's helpline and then emailed the seller to say that the law had changed and that this end-run would no longer work. Well of course we were sad that the deal fell through but if I had been introduced to that council member (who I never met) I would have given her a big hug. She saved us from a potentially disastrous situation. Had I purchased that condo, I could have been fined up to $200 every 7 days for breaking the age bylaw. Or my husband would have had to live elsewhere for a year and a half. Either way, we would have been bankrupt.

That was the first time I had ever heard of VISOA. Is it at all surprising that I became a member? Thank you, thank you, thank you VISOA.

Perimeter Drains – Maintenance is Essential!

By Carell-Ayne Whalen

I feel that it is important for the VISOA members to be aware of this problem and how we are solving it. Why do I feel this way?

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Perimeter Drains - Maintenance is Essential!

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Because, there may be problems with other strata corporations and if I can help, then it is a win-win for us all.

In August, 2013, five adjoining suites on the main floor of our building suddenly received major flood damage. At that time, we were unsure of the reason for the flooding. However, it did come up through the drains in each strata's laundry room, and into the halls and kitchens of their units.

Our Council President and Secretary/Treasurer were extremely efficient & professional in getting to the heart of the matter. The Council hired a plumbing company to investigate the situation to determine the cause of the flooding and remedial action required to ensure this situation does not occur again.

Three major areas of concern were:

1. No access points to the perimeter drains of the building were installed at the time of construction in 1989.
2. Perimeter drains on the west & south sides of the building are almost entirely blocked by roots.
3. The standing water in these areas could lead to deterioration of the foundation.

Maintenance and emergency repairs of the units described above were completed. The Contingency Fund was used to pay for these repairs.

In November, 2013, I met with one of the members of the town's Building Permits & Codes Department.

My question to them was: Did our strata meet the building code in 1989? The answer, "Absolutely! No problems."

They did inform me that when the perimeter drains were installed, no rocks were put in with the pipes. And, even if there were, if would not have stopped the roots from entangling themselves around the pipes.

They also said that the town changed the building code in 1999.

After the August episode of the flooding and once the plumbing company had dug out the perimeters, they left the whole area exposed to the elements. No protection, no tarp to cover the dug-out spaces and the perimeter drains.

Well, lo and behold in November, when we had "torrential rains", the rain filled up in the newly repaired but uncovered perimeter drains.

And, guess what? It flooded again, affecting those poor senior homeowners on the main floor. Definitely not as bad, but because the repairs were not covered until the plumbers could return on Monday, it was a nightmare.

Later in November, we held a Special General Meeting to inform the homeowners what exactly was happening in our building.

Several questions arose from the floor: I being one of the questioners.

My question and concern to the Council was: When a drain cleaning company came to clean out the drains, did they give us a report or an explanation? The reply – absolutely no explanation.

However, the Council did make contact with the company to resolve this situation. Their response – Their contract was to clean the gutters on the roof and down-pipes. Nothing was done to the perimeter drains.

The homeowners were pleased with this answer.

In retrospect, were there warning signs that were ignored or was the whole thing a big, unpleasant surprise?

I can honestly say that there were no warnings of problems at all.

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Perimeter Drains - Maintenance is Essential!

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However, it is my belief that had the main-floor flood not occured, then the roots would have continued to strangle the perimeter pipes, and then eventually the whole foundation would have fallen. What a nightmare that would be!

As a result, the plumbing company will continue to monitor these perimeter drains, so this does definitely not happen again.

As for the senior homeowners on the main floor: they have lost their privacy and security, no protection from public view or the sun. So the Council has contracted with a landscaping company who will install several short hedges around the perimeters with bark mulch and rocks. Then in spring, they will continue with further landscaping. And, I might add, definitely no cedar trees, maple trees or shrubs with huge root systems!

I would also like to thank Gloria at VISOA's Helpline for all her support and advice as I tried to muddle through with our November Special General Meeting. I am a recent homeowner to this complex and my first priority is for myself, but in addition I feel I am a self-appointed advocate for all these seniors. Especially the ones that were totally overwhelmed, stressed and scared as they watched their whole lives turn upside down.

I do hope that this will be of some help.

Thank you,
Carell-Ayne Whalen
VIS 1807

INTRODUCING NEW BUSINESS MEMBERS

VISOA is pleased to welcome these new Business Members. See our website for more details on all our Business Members.

MAC RENOVATIONS LTD. is a professional design/build renovation company serving the capital regional district since 1980. They have vast experience working with strata owners in condominiums and multi-family dwellings, and specialize in kitchen, bath, and building envelope remodeling and design.

VICTORIA DRAIN SERVICES LTD. is a one stop shop providing a wide range of services from power rooting to trenchless pipe replacement. Their technicians are specially trained and know the importance of courtesy and quality service, and will treat your home or job site with the utmost respect.

VISOA vs The Strata Managers

By Sandy Wagner

I sometimes hear that VISOA has a reputation of being "against" Strata Property Managers. Let me assure you: nothing could be further from the truth.

We conducted a survey of our members early in 2013, and the majority of our professionally-managed members are happy with their management agent.

VISOA is not against Strata Managers:

- We are against bad strata managers.
- We are against poorly trained strata managers.
- We are against strata managers who do not know the Strata Property act.
- We are against strata managers who knowingly violate the SPA, or advise their strata clients to violate the SPA.
- We are against strata management companies who don't give sufficient training and supervision to new managers, but simply turn them loose on strata corporations ill-equipped to do the job.

At our Helpline, some of our most frequent questions begin with "our property manager says "x" but it doesn't sound right so I want to check with you…" and it turns out that the manager is giving incorrect advice. Whether the manager is simply ill-informed, or deliberately giving erroneous information we cannot determine – but we give the facts of the SPA to our members and chalk another one up to "bad manager". Over the years, we have occasionally informed our members of disciplinary action taken against local strata managers by their oversight body.

We don't often hear positive stories about "good managers" so we can tend to become a bit jaded – but I can promise you that good strata management companies do exist! One I'll call "Company One" has a particularly good reputation (and sorry, no I can't give a personal recommendation – we really do try to remain unbiased and let you make your own decision).

We have presented seminars on the topic of "pros and cons of a strata property manager" to try to show both sides: self-managed has its proud moments as well as pitfalls, and so does professionally-managed. We invited "Company One" to speak at these seminars as a positive example of good management, but they declined (due to our reputation?), so our members didn't get to hear first-hand stories of good practices.

Two years ago, a newly-minted Managing Broker (the correct term for a Strata Management Company) with no Strata Property Agents on staff wanted to become a VISOA Business Member and we wrestled

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VISOA vs Strata Managers

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with the question – would we allow this or not? Some on the Board thought we would be "endorsing" this company if we accepted their business membership application. Others pointed out that no endorsement of painting companies, insurance brokers or other business members was implied simply because they are our business members. I asked the board: "If this was "Company One" would we even be having this discussion? We all agree that Company One does a fine job, so what would we do if they wanted to become a business member?" It was soon moot, as the new management company withdrew their application before a decision was reached.

Then last year, Gateway Property Management submitted a Business Membership application and the debate was on again. As we have never had management companies as business members would this open a can of worms? Would management companies all start coming out of the woodwork, the good but also the bad and ugly? Board Vice-President John Webb and I met with Gateway's representative to talk it over. I can tell you he wasn't wearing horns, and as you can see by the list of business members, Gateway did indeed become the first strata management company in VISOA's list of business members. Others have followed – we welcomed Oakwood Property Management and Richmond Property Group as business members as well, and have heard nothing negative about this from our members.

Although the majority of our members are self-managed stratas, those who try to find a management company or seek to change companies have some ready resources at their fingertips by scrolling through our business members directory.

Our official policy is "VISOA does not guarantee or warranty the products, goods or services of our Business Members", and I hope you understand that is there to satisfy the lawyers!

I can tell you that I am proud to be associated with ALL our Business Members.

VISOA is in favour of GOOD strata managers.

- We are for well-trained strata managers.
- We are for strata managers who know and understand the SPA.
- We are for strata managers who can give thoughtful and accurate advice on interpretation of the SPA and the duties of the strata council.
- We are for management companies who take an active part in the training and supervision of their management agents.

If you have any comments on VISOA's reputation on strata managers, or comments of any sort, please email me at president@visoa.bc.ca

Sandy has lived in a strata home for 21 years. This strata was self-managed for most of those years and has recently become professionally managed.

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(Please note that VISOA does not guarantee or warranty the goods, services, or products of our business members).

You Asked

Have a question about managing your strata corporation? Ask us, we've had a lot of experience helping strata corporations solve problems - perhaps we can help you. Questions may be rephrased to conceal the identity of the questioner and to improve clarity when necessary. We do not provide legal advice, and our answers should not be construed as such. However, we may and often will advise you to seek legal advice.

Proxy questions are answered by David Grubb.

QUESTION: How to handle proxy appointment when the owner is present?

At a recent General Meeting an owner brought along a person not living in our strata and indicated that this person would act as her proxy and she (the owner) would not partake of the discussions and voting, etc. As we all were surprised by this and were not at that moment familiar with the legalities of this situation, we let the proxy participate in place of the owner who was also present and the two at times had lively whisperings between them. I always understood that a proxy stands in for an owner who cannot be present. Neither the Act nor the Guidelines seem to cover this angle. Could you please advise if this maneuver is legal and what formalities need to be fulfilled first?

ANSWER:

The matter of proxies is one of the most vexing, vague sections of the SPA in general, and the written references I have consulted are singularly silent for the most part on the many contentious issues involved with Section 56!

In terms of your question, under most usual circumstances, one would assume that the proxy was appointed because the owner would not be present "in person". Nevertheless...

In the Definitions section of the SPA we see the following (combined a bit here):

"majority vote" [or "3/4 vote"] means a vote in favour of a resolution by more than 1/2 [or 3/4] of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and who have not abstained from voting;

Strictly interpreted, it would appear that there is nothing anywhere else in the SPA that I could find to prevent an owner from appointing the proxy in accordance to the requirements of s.56(2) as well as attending the meeting himself.

Under those circumstances, presumably, it would be the proxy who would be entitled to speak and vote on behalf the owner in accordance with s.56(4):

(4) A proxy stands in the place of the person appointing the proxy, and can do anything that person can do, including vote, propose and second motions and participate in the discussion, unless limited in the appointment document.

However, the complication might arise if the owner wants to make any comments. As an owner he presumably is entitled to do so. But, probably, he wouldn't be eligible to vote since he has appointed the proxy to do so.

On the other hand, if he didn't like the way the proxy (lacking any written direction on the proxy form) was intending to vote (or propose an amendment), he would have to present a written withdrawal of the proxy form to the Chair immediately at that time in order to "take over" from the appointed proxy for the rest of the meeting. A great way to disrupt proceedings, but quite possibly legitimate.

Attempting to do otherwise -- however tenuous, if not illegal -- would set up a potential situation similar to having two "real" owners of the strata lot capable of having a shared vote, which would require the Chair to apply SPA s.57:

Shared vote

57 (1) If 2 or more persons share one vote with respect to a strata lot, only one of them may vote on any given matter.

(2) If the chair is advised before or during a vote that the 2 or more persons who share the one vote disagree on how their vote should be cast on a matter, the chair must not count their vote in respect of that matter.

Although I can see nothing in the SPA to prevent the owner -- even if he does withdraw the proxy document -- from continuing to consult privately with the person, the Chair could apply Standard Bylaw 26 with respect to that ex-proxy's right to speak on any issue if the person is also a tenant or occupant of the unit:

Participation by other than eligible voters

26 (1) Tenants and occupants may attend annual and special general meetings, whether or not they are eligible to vote.

(2) Persons who are not eligible to vote, including tenants and occupants,

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may participate in the discussion at the meeting, but only if permitted to do so by the chair of the meeting.

(3) Persons who are not eligible to vote, including tenants and occupants, must leave the meeting if requested to do so by a resolution passed by a majority vote at the meeting.

If the person is neither a tenant nor an occupant, presumably he would have no right to speak at all, even if the Chair and/or owners permitted him to remain at the meeting.

QUESTION:

When an owner introduces his proxy at a General Meeting as has occurred in our case, does the owner still have to provide a written proxy document at the beginning of the meeting or can he simply say: "I'd like to introduce Susie X who will act as my proxy at this meeting" or something along those lines?

ANSWER:

Sub-sections 56(2)& (4) make it apparent that the legislators assumed (like most of us) that the owner would not be present and that therefore there must be a written document. Although there is an "optional" proxy document (Form A) supplied as an annex to the SPA Regulations, a proxy could be on a paper napkin... but it must be in writing!...and properly formatted, signed and dated!

Proxies

56 (2) A document appointing a proxy

(a) must be in writing and be signed by the person appointing the proxy,

(b) may be either general or for a specific meeting or a specific resolution, and

(c) may be revoked at any time.

(3) Is not applicable here.

(4) A proxy stands in the place of the person appointing the proxy, and can do anything that person can do, including vote, propose and second motions and participate in the discussion, unless limited in the appointment document.

If, in your case, Susie X was not so appointed it would be difficult to estimate how much she might have influenced other owners in speaking to any issue, but it could be that all votes (even if there was a clear majority) could be called into question as a result of what she had to say. Moreover, her actual votes (and therefore those of the owner) on any of the motions should be discounted (if anyone can remember how she voted) and some votes which were very close (1 or 2 vote differential) could legitimately be declared invalid.

Voting questions are answered by Gloria Martins.

QUESTION: Can an owner second their spouse's motion?

A technical matter that has come up in our strata recently is a question relating to council meeting procedures. We are a 4-unit townhouse strata and each strata lot has 2 owners (joint owners). Under our Bylaws "all owners are on council".

The question is this: Can one of the joint owners make a motion (say the wife of Mr. Z), and can the other joint owner of the same strata lot (in this case Mr. Z) second this motion, i.e. the motion of his wife?

Could you please clarify this point for us. We appreciate your help very much and are thanking you for it.

ANSWER:

Your difficulty stems perhaps from owners in the past redefining your bylaws (perhaps in order to seem more "inclusive"?) by adopting the "condition" at the end of SPA 29(2) so that all owners are included on council.

Membership on council

29 (1) The number of persons on council is determined by the bylaws.

(2) If a strata lot is owned by more than one person, only one owner of the strata lot may be a council member at any one time with respect to that lot, unless all the owners are on the council.

(3) If a strata lot is owned by a corporation, only one representative

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of the corporation may be a council member at any one time with respect to that lot.

(4) If all the owners are on the council, each strata lot has one vote at council meetings.

Standard Bylaw 9 expands on the s.29:

Council size

9 (1) Subject to subsection (2), the council must have at least 3 and not more than 7 members.

(2) If the strata plan has fewer than 4 strata lots or the strata corporation has fewer than 4 owners, all the owners are on the council.

Although your strata has exactly 4 strata lots, it seems that at some time your owners amended the bylaw to delete SB 9(2) and substitute the allowance under SPA s.29(2) to include all owners on council. However, in doing so they chose to ignore s.29(4) – which takes precedence over any bylaw. That subsection automatically limits the ability of "all the owners" to vote on an issue. So even if there was a quorum at a council meeting (which would be 3 council members), two of whom were from the same unit, only one of them could vote anyway, and no motion could be passed. Even if all 8 members were present, this would be true since only 4 of them could vote on the motion, and the two owners would have to decide who would actually vote.

This is verified by SPA s.57.

Shared vote

57 (1) If 2 or more persons share one vote with respect to a strata lot, only one of them may vote on any given matter.

(2) If the chair is advised before or during a vote that the 2 or more persons who share the one vote disagree on how their vote should be cast on a matter, the chair must not count their vote in respect of that matter.

Although that section would appear to apply only to AGMs and SGMs because some of the other sections in Division 5 do refer to General Meetings, it is, in fact, not in Division 4 which pertains exclusively to General Meetings. Thus s.57 could easily be interpreted by the courts (though I am no lawyer or judge to guarantee it) as applying equally to council meetings.

Now, regarding the issue of making and seconding motions at council meetings. I cannot see that there is anything to preclude such action, but since only one of them would actually be able to vote on the motion, there is still the power of the other owners who are the "eligible voters" to vote against the motion!

To make your bylaws absolutely clear, however, my suggestion is that you make another bylaw amendment to essentially revert to the requirement of the first part of SPA s. 29 so that the revised bylaw would read:

Council size

9 (1) Subject to subsection (2), the council must have at least 3 and not more than 4 members.

(2) If a strata lot is owned by more than one person, only one owner of the strata lot may be a council member at any one time with respect to that lot.

By doing so, you will avoid the conflict which you are now dealing with.

Think before you hit send: Council members, Managers and Emails

By Donna DiMaggio Berger, Esq.

Not a day goes by that I do not receive an email communication from a strata councilor or a manager that requires a response and which has multiple addressees attached. Who all these people are is usually anybody's guess.

In the business world, we often preach the benefits of "closed end" communications - you send email only to those who need to be included on that particular topic. Knowing to whom you are communicating helps avoid a lot of problems down the road. The same holds true for strata council communications and yet far too many councilors and even some managers will include people on an email query whom they would not want included in a response.

Most strata councilors and managers do the lion's share of their work via email. That is just a fact of life these days and certainly is a topic for another blog as to whether or not these electronic communications are unfairly squeezing out the communication that needs to take place in front of the membership.

Council members and managers need to be aware of the following when sending and receiving email communications:

- Emails sent from or received by an email address set up for council-related communications become part of the official records and subject to inspection by the membership unless the content is otherwise privileged.
- When adding multiple people into an email communication, there should be an identification of those people and the reason they are included on the email. For example, if you are asking your attorney for an opinion on a parking matter, you may want to advise your attorney that you've included Bob and Mary, your fellow council members, Joe the manager and Mrs. Smith who has requested the accommodation to move to another spot.
- Remember if you include a non-board member like Mrs. Smith on your email communication, you have jeopardized your attorney-client privilege.
- Auto-complete can be a very dangerous thing, particularly if you are sending email communications on sensitive topics. You may think you have sent your email to Joe Warren when in fact you have sent it to John Walsh. Again, auto-complete can result in the destruction of attorney-client privilege as well as just being a source of embarrassment should a communication wind up in the wrong inbox.
- Ask yourself why you are adding ten people on an email communication. Will doing so help achieve your council's objective or is it being done to either grandstand or as a "cover your tracks" tactic?
- Know that most people who receive an email with many listed recipients will automatically hit "Reply All" to that message. If having the reply go to everyone was not your intention, then you need to either state in the email to whom the response should be sent or resist the urge to send open-ended email communications in the first place.
- Naturally, blind copying people on your email communications usually results in hurt feelings or worse.

So what do I do now when I receive emails with recipients listed with whom I am not familiar? I ask via return email to all to identify themselves prior to sending a substantive reply.

Donna DiMaggio Berger, Esq. is a founding partner with Katzman Garfinkel & Berger and can be reached at dberger@kgblawfirm.com. More of Donna's thoughts can be found at her blog www.condoandhoalawblog.com Reprinted with permission.

Renters under the Strata Property Act

By Shawn M. Smith, Esq.

Section 141(2) of the Strata Property Act ("SPA") permits a strata corporation to restrict the rental of strata lots by a bylaw that:

(a) prohibits the rental of residential strata lots, or

(b) limits one of more of the following:

(i) the number or percentage of residential strata lots that may be rented;

(ii) the period of time for which residential strata lots may be rented.

Most strata corporations pass bylaws of this nature with the expectation that subject to a few limited exceptions (original purchasers, family members and hardships) the building(s) will become owner-occupied. The rationale behind this is twofold: owners have a vested interested and will take better care of the building, and a building without tenants increases the value of the strata lots.

Such bylaws can create problems for owners who bought thinking they could rent or who move but don't want to sell. Owners wishing to rent but who don't fall within any of the exemptions often turn to creative and, at times deceptive, means to get around rental restriction or prohibition bylaw. These may include adding a tenant to the title of the strata lot or claiming that the person is just "house sitting".

In addition to these scenarios there are other living arrangements, such as roommates and short-term rental accommodation that also give strata corporations cause for concern. The purpose of this article is to try and make some sense, although not exhaustively, of this rather complicated landscape.

The SPA recognizes three classes of people that may be found in strata corporations: owners, tenants, and occupants.

"Owner" is defined as: a person, including an owner developer, who is

(a) a person shown in the register of a land title office as the owner of a freehold estate in a strata lot, whether entitled to it in the person's own right or in a representative capacity, or

(b) if the strata lot is in a leasehold strata plan, as defined in section 199, a leasehold tenant as defined in that section,

unless there is

(c) a registered agreement for sale, in which case it means the registered holder of the last registered agreement for sale, or

(d) a registered life estate, in which case it means the tenant for life.

"Tenants" are defined as: a person who rents all or part of a strata lot, and includes a subtenant but does not include a leasehold tenant in a leasehold strata plan as defined in section 199 or a tenant for life under a registered life estate.

"Occupants" are defined as "a person, other than an owner or a tenant, who occupies a strata lot".

The Standard Bylaws refer to the term "visitor" which is not defined, but would be someone who does not fall within any of the three categories.

S.141 of the SPA and most rental restriction bylaws do not refer to the term "tenant". Instead they talk about the "rental" of a strata lot. The definition in the SPA of "tenant" refers to someone who "rents". In determining whether an owner has breached a rental restriction bylaw,

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the strata corporation must determine whether or not they are "renting" their strata lot. The SPA does not contain a definition of the word "rent". The Canadian Oxford Dictionary defines it as "regular payment made by a tenant to an owner or landlord for the use of land or premises". This definition envisions an exchange of money taking place. Where that is the case, the strata lot is being rented and the bylaw has been breached. Simple enough.

What about cases where the arrangement between the owner and the person occupying the unit is less formal (ie. a house sitting arrangement)? In those instances the answer to the question of whether or not the rental restriction bylaw has been breached is not as clear. Based on the definition of "rent" taken from the Canadian Oxford Dictionary there is no breach. However, the Residential Tenancy Act ("RTA") defines "rent" as "money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities…" It is this expanded definition that would encompass many a housesitting situation. If someone is watering your plants, feeding your cat and generally keeping an eye on the place, you are arguably receiving value in exchange for their living there. Of course, the definition of "rent" found in the RTA does not automatically apply to the SPA. However, it is persuasive.

In Strata Plan VR2213 v. Duncan 2010 BCPC 123, the British Columbia Provincial Court (Small Claims Division) considered whether persons occupying a furnished strata lot on a short term (ie. one or two week basis) were tenants. In Duncan the owners of the strata lot had rented it to a company that provided short term furnished accommodation to third parties. The issue before the court was: whether or not each time someone occupied the unit, a Form K was required. In the end, the court held that a Form K was not required because the persons occupying the units were not tenants but rather "occupants" given the short-term nature of their stay. The court concluded that the arrangement between the corporate tenant and the person(s) occupying the unit did not have hallmarks of a tenancy, was thus a license agreement and not within the scope of the bylaw. The judge was also of the view that "the scheme of the Act and the bylaws contemplates persons lawfully occupying units who are neither owners or tenants or subtenants". If Duncan were applied broadly it would permit the occupancy of strata lots under less conventional arrangements and there would be no breach of the bylaws. However, there was no discussion in Duncan about the definition of "rent". If that had been engaged in the outcome might well be different. The persons occupying the unit might be held to have been paying "rent" thereby placing them within the definition of a tenant under the SPA.

Some owners take the bold (and rather risky) step of placing their tenant on title to their strata lot albeit for a very small percentage (say 1%). Doing so, arguably, no longer makes that person a tenant since the definition of "owner" refers to the person who is registered on title to the strata lot, whether entitled to it in their own capacity or in a representative capacity. Even though the tenant is on title, the beneficial ownership of the property belongs to their landlord. Nonetheless they are an owner under the SPA and not renting the strata lot. Such arrangements are arguably a sham transaction and might not be honoured or recognized by a court because of that.

One way of achieving the goal of the tenant being an owner is to enter into a formal agreement for sale, which is registered on title. Under the definition of "owner" in the SPA, the holder of an agreement for sale (being the tenant/buyer) is the owner of the strata lot. However, the true owner must recognize that with this comes a loss of control over the unit and the obligation to sell it to the tenant at the end of the agreement's term (unless the tenant opts out).

Many strata corporations are concerned about owners who have roommates. Are they breaching a rental prohibition bylaw by doing so? Arguably yes. The definition of "tenant" includes someone who rents part of a

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strata lot. However, the RTA excludes from its jurisdiction properties where the landlord and tenant share a kitchen and/or bathroom. If that exclusion were to prevail, then the decision in Duncan would mean that roommates are not tenants because there isn't the formality of a tenancy relationship.

As you can clearly tell, there is not a clear answer to the dilemma of whether someone in a non-conventional landlord-tenant arrangement is a tenant or not. Clarity can perhaps be achieved through the bylaws. The court has upheld bylaws that regulate the use of strata lots in a commercial context. In Ontario the courts have upheld bylaws that restrict strata lots to use as a single-family dwelling. A prohibition on roommates may be permissible, but is it necessary? There are many people who dwell in strata lots who are neither owners nor tenants; i.e. spouses who are not on title, children, siblings. Does a prohibition on roommates really achieve anything?

Another possible approach is to define in the bylaws what "renting" is. For example:

"For the purposes of this bylaw, the rental of strata lot shall be defined to include occupancy of a strata lot by a person who is not an owner, without the owner also residing in the strata lot, for a period of greater than ninety (90) days regardless of whether or not money or other consideration is paid for the right to reside in the strata lot".

A court will likely give deference to a strata corporation's defining what a tenancy is or isn't so long as the definition is reasonable. However, there is no guarantee in that regard. It might be viewed not as defining "rent" but amending the definition of "tenant", which is not allowed.

Based on the decision in Duncan rentals for the purpose of short-term accommodation appear to be permissible. However, there was no consideration as to whether these arrangements could be prohibited by way of a bylaw that either directly prohibits doing so or one that prohibits commercial activity. With regard to the latter, the argument would be around whether or not that sort of activity is "commercial" in nature. There are undoubtedly a variety of cases that go each way and a court will ultimately have to reconcile those. We cannot do that here, however.

Until a court or the Legislature addresses these issues there will continue to be uncertainty regarding some of these less conventional arrangements. Until then strata corporations, owners and those who advise them will have to deal with these issues as best they can.

Shawn M. Smith is partner with the law firm of Cleveland Doan LLP located in White Rock and may be reached at 605.536.5002. He practices primarily in the area of strata property law. This article is intended for information purposes only and nothing contained in it should be viewed as the provision of legal advice regarding a specific situation.

NEW VISOA PUBLICATION – Best Practices for BC Strata Treasurers

By Cleveland Patterson, MBA, PhD

The Standard Bylaws contained in the *Strata Property Act* (SPA) call for the election of a President, a Vice President, a Secretary, and a Treasurer from among the members of the strata corporation's elected council. The duties of the Treasurer are not defined, but they generally encompass the strata's financial affairs. In stratas which are self-managed, they usually include all or most of the following:

1) Prepare a draft annual budget for Council's review and approval by owners;

2) Establish and maintain bank and investment accounts;

3) Collect strata revenues and pay strata expenses;

4) Maintain strata accounts and prepare and present financial statements;

5) Provide advice to Council regarding Depreciation Report funding plans;

6) Invest contributions made by owners to the Contingency Reserve Fund (CRF); and

7) Arrange for adequate strata insurance.

In stratas which employ the services of a licensed strata agent, or "strata manager", many of these activities may be delegated. However, delegation of the activities does not relieve Council from its responsibilities to make decisions on behalf of owners and to direct the strata manager. The Treasurer's role then is to help Council to make decisions related to the above activities, and, if they are permitted by legislation, the bylaws, and the service contract, to ensure that they are carried out by the strata manager.

VISOA's new publication, *Best Practices for BC Strata Treasurers*, is a practical "how-to-do-it" manual which discusses all of these activities in detail for the benefit of Treasurers of self-managed stratas, and also includes a section on how to partner with a strata manager to carry them out.

The publication includes a comprehensive list of sources for further information which may be useful to Treasurers. It also includes a CD which contains an Excel workbook, created by VISOA, entitled STRATACCOUNT. This is a simple accounting package for self-managed stratas, specifically designed to record the strata's financial transactions and to produce financial statements for the operating fund and the contingency reserve fund which conform to SPA requirements. It is accompanied by instructions which are written for users who have little or no accounting or Excel expertise. STRATACCOUNT, by itself, is available free to all VISOA corporate members.

Copies of *Best Practices for BC Strata Treasurers* can be ordered by clicking on Publications on www.visoa.bc.ca.

Cleve Patterson is a retired Professor of Finance and a member of the Board of Directors of VISOA. He is the author of "Best Practices for BC Strata Treasurers" and of STRATACCOUNT, and also author of VISOA's publication, "Management of the Contingency Reserve Fund".

And the Academy Award goes to .....your strata council?

By Donna DiMaggio Berger, Esq.

As a movie buff, I love nothing better than seeing my favourite flicks time and again. As a blogger on community association issues, I can't help but draw some analogies between some of my favorite movies and what I do in real life, helping community associations. I started thinking about some of the ways Hollywood has depicted community life over the years. Let's take a look.

The Crucible: This was originally a 1953 play by Arthur Miller based on the Salem Witch Trials. The 1996 movie with Daniel Day Lewis and Winona Ryder does a great job of depicting a community beset with hysteria where the court (aka strata council?) is treated to some testimony that is less than credible but consistent in terms of its targets. Miller's play has been re-staged countless times since its creation and was also made into an opera so obviously the "witch hunt" theme hits many nerves including with some modern day strata members.

Rosemary's Baby: Who can forget Roman Polanski's 1968 horror film? Was there ever a creepier strata council? Ever?

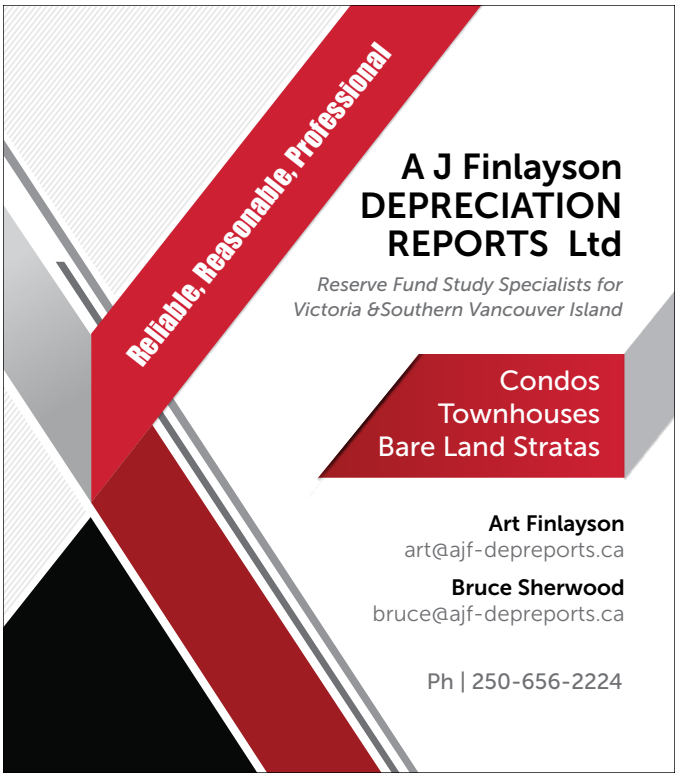
The Neighbours: While Dan Aykroyd and John Belushi are best known for their pairing in the Blues Brothers, this dark comedy based on the book by Thomas Berger (no relation) portrays suburban warfare in its most paranoid incarnation.

Over The Hedge: This animated film by Dreamworks is one of my favorites. Even though most of us love cute little animals, Allison Janney plays the voice of Gladys Sharp, the president of the Camelot Homeowners Association who is disgusted by the furry intruders into her community. Spoiler alert if you haven't seen the movie already - at the end, Gladys is arrested for using an illegal animal trap known as the Depelter Turbo.

And on the small screen, a new TV show starring Jami Gertz also bears the name of The Neighbors. In this show, Debbie and Marty Weaver cannot believe their luck in buying into a beautiful, gated townhouse community in New Jersey at a great price until they find out all of their neighbors are aliens. Community members all dress exactly alike and patrol the common property in golf carts.

If you have never seen the foregoing movies or haven't seen them in a while, check them out with a strata corporation perspective in mind when you do. Also, ask yourself if Hollywood was going to depict your strata on the big screen, what would that movie look like?

Donna DiMaggio Berger, Esq. is a founding partner with Katzman Garfinkel & Berger and can be reached at dberger@kgblawfirm.



GREEN CORNER: Things Get Stormy Over Stormwater

If your strata is in the City of Victoria, (though not necessarily in the rest of the Capital Regional District yet) then you may have caught wind of changes that you will be seeing on your strata's utility bill beginning in September 2014. In addition to the current water and sewer charges, stratas of 5 or more units will see a new utility charge called the Stormwater Utility.

Essentially stormwater is all of the runoff from your property that enters the city storm drains. Currently 5% of the property tax paid by individual owners is used to maintain Victoria's water management systems – a total of 4.6 million dollars. For stratas of 5 or more units, the new billing system means that an owner's property tax bill will go down and the strata will be billed for the new utility. (The utility charges for single-family homes (1-4 units) will be billed to each individual owner.)

How will the Stormwater Utility be calculated? This is where it gets a bit confusing. It is not simply moving the 5% property tax amount over to the strata. Whereas that amount is calculated on property value, the new Stormwater Utility will follow a user-pay model, so properties that send more water to the stormwater system will pay more and properties with more permeable areas, thus sending less water to the system, will pay less. Using tools such as digital fly-over photography, Stormwater Utility charges will be calculated based on the amount of hard or "non- permeable" surface area, such as roofs, driveways, parking lots and other paved surfaces that water can't flow through. Permeable surfaces such as lawns and gardens absorb water thereby reducing flooding. They also naturally filter water allowing fewer contaminants such as oil, metals, sand and dirt to enter waterways.

Climate predictions for the future indicate that the demands on Victoria's stormwater system will be increasing. It is projected that by 2050 Victoria will see up to a 14% increase in winter rain and up to a 15% increase in the frequency and intensity of storms, along with sea level rise. This means that more water will be flowing through the system and the risk of flooding will increase, as seen in recent events in Calgary and Toronto. Taking steps towards reducing the amount of water that enters the system is probably a good idea.

There is also good news. The Stormwater and Rainwater Credit Program will award credits of up to 40% for properties that manage their rainwater. At a presentation by the city last November, many innovative solutions were presented and there may be a "trade show" in the future to showcase some of the products available on today's market. A cistern may be an affordable way to get on board with the added benefit of providing water for your lawns. A rain garden is both practical and attractive. These credits will certainly be a factor to consider when it comes time to replace more expensive infrastructure. Permeable paving could be used instead of standard asphalt and concrete for walkways and parking areas. If your building is suitable, you may want to consider having a professional engineer design a green roof. A retrofit green roof can be rolled onto an existing roof in just days, providing insulation which can reduce energy costs.

To learn more about the credits, visit the City of Victoria's website www.victoria.ca and search for Stormwater. Under Rainwater Management, you will find a pdf for the Multi-Unit Residential Credit Programs.

For more information contact the City of Victoria's Engineering Department. Phone (250) 361-0443 or email stormwater@victoria.ca

President's Report

Sandy Wagner

As 2013 drew to a close, your Board reviewed our Strategic Plan to see how our long-term goals are shaping up. Some of these goals, which we believe we are achieving are: adding revenue to enhance member services; streamlining administrative processes; developing and maintaining a strong board and broad base of volunteers; and augmenting the seminar/workshops program.

Three of our other long-term goals which are still in progress are: to encourage and support local networks of strata owners; to develop and enhance mechanisms for communication with strata councils; and to create an online forum for members' comments. These three items are all tied together – an online forum would certainly enhance communication and local networking, however such forums are time-consuming to maintain and can also be costly. We shall be researching them this year, in the hope that a forum can be running by the end of 2014.

With our fiscal year just ending and the AGM approaching, I thank this year's hard-working Board, whose names appear on the front of this Bulletin. Unfortunately we will be saying goodbye to three Directors who are stepping down from your Board: Tony Davis, Cleve Patterson and Paulette Marsollier. After eight years of service which included redesigning all our publications, revamping our website, and serving as President, Tony will now be spending more time with his family and travelling. Cleve has written two publications, almost single-handedly created our workshop program and doubled our number of Business Members in his two years as a Director; he will also be doing more travelling. Paulette has been a liaison for us with Realtors and worked on our bare-land strata group, and serves on several other volunteer boards in addition to her busy career as a Realtor. She plans to devote more time to her other endeavours and take the occasional vacation too. All three plan to stay on as active volunteers, however – Tony on our website team, Cleve with our workshops, and Paulette with our seminars. I thank them for their service.

At our AGM, we will present 5 nominees to the board, to fill these three places as well as other vacant seats. Two are familiar faces: Laurie McKay and David Grubb are former board members who took a short break from duties and are now returning (though David never really left and has been volunteering with the Helpline, the Bulletin and the latest new VISOA publications all along). Of the three new nominees, two have also been volunteering with us for some time: Lynn Klein and Deborah Fraess have helped at our seminars during the past few years, and the third, Denise Brooks has assisted with our workshops. Lynn and Deborah bring many years of strata experience, and Denise has the dual perspective of being both a strata owner and a licensed strata property manager. You will hear more about these nominees at our AGM February 16th and we anticipate that all will be elected.

Our AGM will be held at a new venue this year – the Comfort Inn has more parking than our previous meeting hall, in order to accommodate our ever-growing membership. Guest speaker at the conclusion of the AGM will be lawyer Tino Di Bella who is always most enlightening.

All your Board members wear more than one "hat" and in addition to serving as your President for the past few years I am currently Bulletin Editor. So let me now change topics completely and talk about the Bulletin.

With an increasing number of business members, we have also had an increase in the number of advertisements. We made an editorial decision not to permit any full-page ads, and to eliminate half-page ads when current contracts end. Our November 2013 Bulletin had more ads than ever – but in order to keep the right balance between ads and articles, we increased the number of total pages to 20. Less than three years ago, our bulletins were 12 pages, then 16, and we do hope you are enjoying the expanded editions. I can't promise we will always have 20 pages but we'll aim for that. We are always on the lookout for interesting articles and topics to share with you, so I follow many condo-related tweeters and bloggers for ideas.

In this issue of the Bulletin, we are featuring two articles written by a Florida lawyer, Donna DiMaggio Berger. I follow her blog and although many of her articles are Florida-specific, there are plenty of informative items for all condo owners. One of her articles is on the importance of appropriate email procedures for council members, and the lighter piece correlates strata life to movies. I've changed the words "home owners association" to "strata corporation" and "HOA Board to "strata council" and with those few changes, I know you'll find Donna's work interesting.

I have written a short editorial highlighting VISOA's relationship with Strata Managers; please write and give me your opinion. We are also including two "letters to VISOA" from members; an article on rental bylaws by lawyer Shawn M. Smith; and information on our newest publication "Best Practices for BC Strata Treasurers". Finally, our occasional feature, "Green Corner", returns with some explanations on the institution of "stormwater billing" in the City of Victoria.

As always, if you have any comments on this Bulletin, ideas for future articles, or if you would like to contribute an article of your own please contact me at editor@visoa.bc.ca

Sandy