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VISOA Bulletin - NOVEMBER 2016

Thoughts on Short-Term Vacation Rentals

Do Stratas Have to Share in a Sharing Economy?

By Eric Ney

In a report developed by Young Anderson Barristers and Solicitors ("To Air (BnB) is Human: Regulating the Share Economy, 2015"), they discuss the role of local government in regulating short term vacation rental (and other share economy) businesses such as who can be regulated, the nature of the regulation that can be applied and how to enforce such regulations, but more importantly the report documents the impacts on stratas, which are most affected by the rise of short term vacation rentals.

"Strata corporations and other multi-family building associations have legitimate concerns about allowing access to short-term renters, such as significantly increased security and insurance risks, as well as potential decreases in property values and quality of life.

"While legal sub-letters are subject to proper screening, temporary guests bypass this critical layer of security, allowing them access to the building and its shared amenities – and that poses a safety risk for everyone.

"In addition to security concerns, short-term guests with an "I'm on vacation" mindset may improperly use or damage the building's amenities or common areas, thereby decreasing residents' quality of life."

In her June 2016 report to City Council, Jocelyn Jenkyns, the City of Victoria's Deputy City Manager, reported on existing city policy guidelines and regulations related to short term vacation rentals. Unlike most other jurisdictions that have developed similar reports on this topic, Ms. Jenkyns took the opportunity to be inclusive of those residential communities which are currently the most impacted by the rise of the short term vacation rentals: "STVRs [short term vacation rentals] have a significant impact on the day to day operation of residential strata and are not favoured by most Strata Corporations, for a variety of reasons. There is interest from local Strata Corporations to be involved in this entire discussion as it moves forward."

Ms. Jenkyns' comments are refreshing, since most jurisdictions focus solely on leveling the playing field regarding the collection of

Continued on page 2

In this issue...

equivalent hotel taxes by operators of short term vacation rentals, without any regard to the impacts of those that have to live next door to a sharing economy business.

Victoria has a variety of ways to effectively limit the impact of short term vacation rentals on residential stratas, including changes to zoning bylaws and changes to business licensing policies. In Ms. Jenkyns' report she discusses residential (suburban) neighbourhoods and the impacts of STVRs to those low-density communities, but does not mention impacts to the high density strata residential (urban) communities - those are typically built in commercial zones, but are often the targets of property owners who buy strata lots for the sole purpose of operating a STVR. Changes in zoning bylaws to create a strata residential zone that allows for residential occupation only [i.e. owners and legitimate tenants], would be a good first step to combating the commercialization of what should be residential only properties. Updates to business licensee policies would further ensure that no commercial business license would be granted to an individual that owns property within a strata residential zone.

If the creation of strata residential zoning is not an option for the city, then updating business license policy guidelines that require a letter of authorization from the strata corporation when owners of strata lots apply for a transient accommodation business license would ensure that strata owners are compliant with strata bylaws.

Although neither changes in zoning bylaws nor changes in business licensing policy would altogether eliminate strata owners from operating short term vacation rentals, these changes would certainly go a long way in preventing individuals from operating without the required zoning and licensing. That being the case, detection and enforcement would become much simpler.

Regardless of how local governments develop regulatory frameworks to better manage short term vacation rentals, no solution will be complete without including discussions with residential strata communities which are most affected by short term vacation rentals.

Eric is president of his strata council in Victoria, and is currently on the board of the Victoria Downtown Residents Association. Eric can be reached at eric.ney@gmail.com

The Young Anderson article to which he refers can be read at:

http://www.younganderson.ca/publications/seminars/to-air-bnb-is-human-regulating-the-share-economy

Changes to Common Property

By Shawn M. Smith, Barrister & Solicitor

The old adage that nothing stays the same applies to strata corporations as much as anything else. Changes to the common property (often to the exterior of a building) are becoming more common as strata corporations age. Owners may wish to improve the exterior of their strata lot as part of renovations to the unit as a whole. Those changes could include such things as extending decks, adding a solarium or making changes to windows and doors. As buildings themselves age, strata corporations may undertake work to refurbish the building, including changes to the configuration and appearance of the building itself. Perhaps even a modernization. Changes to landscaping, clubhouses and other exterior areas also become necessary or desirable.

Changes to the common property are subject to the provisions of the strata corporation's bylaws as well as the *Strata Property Act* (SPA) itself. In this article we will review those provisions and how they apply to changes to the common property (whether by individual owners or the strata corporation itself).

Standard Bylaw 6 under the SPA governs requests by owners to alter the common property. It provides as follows:

Obtain approval before altering common property

6 (1) An owner must obtain the written approval of the strata corporation before making an alteration to common property, including limited common property, or common assets.

(2) The strata corporation may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

Not every change to the common property will be subject to the terms of the bylaws. For example, Standard Bylaw 6 applies only to "alterations". The phrase "alterations" has been defined to mean "something that changes the structure"; see *Wentworth Condominium Corp. No. 198 v. McMahon* 2009 Carswell Ont 1273, 175 A.C.W.S. (3d) 1192, 81 R.P.R. (4th) 310 affirmed 2009 ONCA 870.

In *Strata Plan LMS 4255 v. Newell* 2012 BCSC 1542 the court held that the placement of a hot tub on a rooftop deck was not an alteration because it was not designed to be permanent. As such, the owner was not required to obtain the strata corporation's permission to install the hot tub.

Strata corporations which wish to have a greater degree of control over what owners do to and place on the common property will need to amend their bylaws accordingly. They may wish to expand beyond the term "alteration" to refer to additions, changes and improvements. They may also wish to enact bylaws to restrict what may be placed on the common property.

Some strata corporations may have bylaws that do not use the language found in Standard Bylaw 6. For example in *Buchbinder v. Strata Plan VR2096* [1992] B.C.J. No. 752, 12 B.C.A.C. 132, 22 R.P.R. (2d) 40, the court held that the placement of a shed in the backyard of the strata lot was not a "change to the building exterior" since that term referred to the outer facing of the building. Similarly in *Harvey v. Strata Plan NW2489* 2003 BCSC 1316A, the court held that a bylaw prohibiting changes to the structure of the building did not apply to the installation of flooring because the flooring was not part of the structure despite being attached to the subfloor. As can be seen from these two cases it is important to ensure that any bylaw governing alterations (whether to the common property or a strata lot) refer correctly to the areas to which it is intended to apply.

Standard Bylaw 6 requires that any permission given by the strata corporation must be in writing and must be given prior to starting the work. The requirement that the approval be in writing is critical in order to avoid owners asserting that they received verbal permission from the strata manager or a strata council member.

Where an owner undertakes alterations without having received proper permission, they can be subject to a fine every seven (7) days that the alterations remain in place without approval (assuming the bylaws provide for that). It is open to the strata corporation to give approval after the fact provided that the strata council considers it appropriate to do so. Where an owner has not received approval, the strata corporation can remove the altera-

Continued on page 4

Changes to Common Property
Continued from page 3

tion and charge the costs of doing so back to the owner pursuant to s.133 of the SPA. Or it can seek a court order pursuant to s.173(1) of the SPA that the alteration be removed. It is no justification for an owner to say that he was unaware or had forgotten that prior permission was required before making a change to common property - see *Barnes v. Strata Corp. NW3160* [1997] BCJ 1081 (BCSC).

The strata corporation is recognized as having virtually unfettered discretion when it comes to changes to the common property. The refusal of the strata corporation to permit an owner to place paving stones on the common property did not amount to a significantly unfair act under s.164 of the SPA. See *Fenby v. Strata Plan NW228* 2002 BCSC 936. In *Getzlaf v. Strata Plan VR159* 2015 BCSC 452 the court held that the strata corporation did not act in a significantly unfair manner when it refused to allow an owner to put back certain pre-existing improvements to the common property after the parkade membrane was restored. The strata corporation had good reason for refusing the owner's request in that the alterations could negatively impact the performance of the new membrane. However, in *Dollan v.Strata Plan BCS1598* 2012 BCCA 44 the court overturned the strata corporation's refusal to let owners install a view window in place of a spandrel window on the grounds that it was significantly unfair to do so. The court established a two-part test, which looked at what the owners' reasonable expectations are. In that case, the owners had expected clear glass to be installed by the developer (which it wasn't). It is clear, then, that while the strata corporation's decision with respect to whether or not to approve changes to the common property is generally respected, it is not absolute. Given the test established in *Dollan* it is likely that discretion has been eroded somewhat.

The requirement under Standard Bylaw 6 for the strata corporation to approve alterations extends to the limited common property as well. However, given the nature of limited common property (that it is, for the exclusive use of a owner) the strata corporation's authority is somewhat less. In *Moure v. Strata Plan NW2099* 2003 BCSC 1364, the strata corporation had to remove the Moures' ceramic tile deck in order to fix the roof membrane below. The strata corporation wished to replace the deck with concrete slabs for ease of future access. The Moures objected to that. The court decided that the strata corporation was not required to replace the ceramic tiles but could not prevent the Moures from doing so because "limited common property must be seen as a special category of property over which the unit owner has a substantial degree of control and something approaching a beneficial interest."

Changes to the common property (whether made by the strata corporation or an owner) are also governed by s.71 of the SPA which provides as follows:

Change in use of common property

71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless

(a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

What constitutes a significant change was discussed in *Foley v. The Owners, Strata Plan VR387* 2014 BCSC 1 333. In that case, the court cited an earlier unreported decision, which set out six factors to be considered when determining whether or not change is "significant". Those are as follows:

1. A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;

2. Whether the change to the common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units;

3. Is there a direct interference or disruption as a result of the changed use?

4. Does the change impact on the marketability or value of the unit?

5. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential or mixed use.

6. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in

Continued on page 5

the past? Has it operated on a consensus basis or has it followed the rules regarding meetings, minutes and notices as provided in the *Strata Property Act*?

The court went on to conclude that the alterations made to a rooftop deck including the extension of the deck and addition of new railings was a significant change to the common property based largely on the visibility of the change and the fact that one unit would lose privacy and one would be subjected to greater noise.

Other cases have considered the application of s.71 as well. For example, in *Reid v. Strata Plan LMS2503* 2003 BCCA 126 the court held that the placement of potted plants, cedar trees and other bushes on a common property entrance area was decorative and did not constitute a significant change under s.71. In *Sidhu v. The Owners, Strata Plan VR1886* 2008 BCSC 92 the court concluded that the cutting of six of 2 to 3 inch holes in the exterior wall of the building to allow for vents was a significant change in the appearance of the common property. (The court also held that to be a breach of the strata corporation's alteration bylaw; which was the same as Standard Bylaw 6).

Quite recently, the court again had the opportunity to consider the application of s.71 in *Frank v. Strata Plan LM5355* 2016 BCSC 1206. In that case, Mr. Frank owned a penthouse suite in a 26 story building in Vancouver. He had access to a private rooftop deck, which was designated as limited common property for his use and identified on the strata plan as such. Mr. Frank improved the deck by installing concrete pavers. He discovered, however, that the parapet walls surrounding the rooftop deck were lower than the height required under the BC Building Code. As such, he sought and obtained the permission of the strata corporation to rectify the situation. However, the strata corporation took the view that new railings would constitute a significant change in the appearance of the common property and insisted that a ¾ vote was required before it could give final approval.

The court was asked to determine whether or not the new railings constituted a significant change in the use and appearance of the limited common property. The court determined that it did not stating the following:

[48] Here, the roof deck is limited common property designated for Mr. Frank's unit, and by installing railings on the parapet walls of the building, he is not extending the area to which he is entitled under the Strata Plan. The railings will impact the marketability of his unit by restoring the value of the recreational use he formerly enjoyed for many years and reasonably understood was permitted. Mr. Frank's use of the roof deck has not affected any other strata units and the other penthouse owners have not objected. The railings, which will be consistent in design with all other railings on the building, will only be visible to the other penthouse owners and are not at all visible to the public given that the building has 26 stories.

[50] In all of these circumstances, it is my view that the installation of railings does not constitute a significant change in the use of Mr. Frank's limited common property. Nor does it constitute a significant change in the appearance of the limited common property, as the railings will be consistent with all other balcony railings on the building and in any event, they will visible only to the penthouse owners who access their own roof areas. This latter point was essentially conceded by the Strata Corporation in argument.

Section 71(b) of the SPA provides an exception to the 3/4 vote requirement. That exception is where "there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage." In *Frank* the court determined that the need to replace the railings in order to ensure the safe use of the rooftop deck fell within this exception. However, there was no discussion with respect to the requirement that the need for change be "immediate". One interpretation of that condition would be that the change could not wait the 20 day notice period under s.45 of the SPA. The decision in *Frank* may have rendered that requirement a nullity.

The requirements of s.71 of the SPA do not apply just to changes done by or at the request of an owner. They also apply to changes carried out by the strata corporation. Things such as the removal of large trees, a change in the colour of the building as a result of an exterior painting project or a change in roofing material or siding material could well invoke the provisions of s.71. When undertaking a large scale project, consideration must be given to whether there is a need to obtain ¾ vote approval in relation to any such change. That consideration is particularly important when the project is being approved

Continued on page 6

Changes to Common Property

Continued from page 5

by way of a majority vote under s.96(b) of the SPA on the basis that the work was "recommended" in a depreciation report. If the project involves a significant change in the appearance of the common property, the 3/4 vote threshold may be reimposed by virtue of s.71of the SPA.

It is important that strata corporations understand the various legislative requirements (including those found in the bylaws) surrounding approval of changes to the common property. Understanding those requirements will ensure that proper approval for the work, whether by the council or the owners, is granted.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is a 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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These businesses have chosen to support our member strata corporations and owners by joining VISOA's growing group of Business Members. We encourage all our members to return the support we receive from the business group by including these businesses in their consideration for provision of services for their corporation.

CARE AND MAINTENANCE OF YOUR WATER DISTRIBUTION SYSTEM

By Doreen Robertson

The water distribution system within a building is one of the most complex and challenging components to maintain. With a large part of the system hidden within walls and ceilings, failures and leaks are often difficult to detect until it is too late and damage has been done. Next to a fire, water damage is the most expensive problem a building will face.

Here on Vancouver Island we have a unique situation where we rely mostly on soft rain water collected from surface basins and shallow wells. This soft water is slightly acidic in nature, high in dissolved oxygen, and essentially mineral free.

With very little buffering capacity and having had little opportunity to pick up essential minerals or reduce oxygen content before reaching our pipes and taps we are left with very "hungry" and unstable "aggressive" water.

As this "hungry" water seeks available minerals to stabilize itself, it finds opportunity in our plumbing systems, heat exchangers and hot water tanks for satisfaction. In systems within buildings, where water is in constant circulation for convenience, pipes are under constant attack. It is not uncommon to see evidence of corrosion and pinhole leaks appear in pipes in as little as 10-12 years after installation.

Noticeable signs of corrosive water include blue-green stains on sinks, tubs and fixtures, metallic taste in water and pin hole leaks in plumbing systems.

Understanding our water and how it interacts with the metals in our pipe systems is half the battle in preventing early pipe system failure due to corrosion.

1) The pH of west coast water can range anywhere between 6 (acidic) to slightly above 7 (neutral). The more acidic the water, the more corrosive the water can be to our plumbing systems. The optimum pH level is between 7.5 and 8.0.

2) Alkalinity acts as a buffer, and is a measurement of the capacity of water to neutralize an acid. In nature, measuring alkalinity is important in determining a stream's ability to neutralize acidic pollution from rainfall or wastewater. Optimum alkalinity range is between 150 & 200ppm. High alkalinity levels cause other corrosion problems.

3) Total dissolved solids (TDS) are a measure of all mineral salts and metals in the water that contribute to the overall mineralization. Levels of around 200ppm are optimal to allow a fine protective coating to form on the interior of pipe systems. Low-mineralized water is unstable and therefore, highly aggressive to materials with which it comes into contact. Vancouver Island water is lacking in calcium and magnesium, which are essential for good health.

4) Dissolved oxygen in water is a primary corrosive agent. Water exposed to air absorbs oxygen. Oxygen in rain and surface water is usually

Continued on page 8

Continued from page 7

removed when water seeps deep into the ground. West coast water usually does not have this opportunity.

5) Copper rarely occurs naturally in drinking water, but can occur in the water we drink as a result of corrosion within a water system. The US Environmental Protection Agency has set the acceptable level of copper in drinking water at 1.3ppm. Health Canada has <1.0ppm as acceptable.

Copper pipe has been the industry standard building material for many years and still remains the most dependable. The expected life for copper pipe is 50 + years under "normal" circumstances where water comes from deep underground aquifers and natural minerals have been collected.

Though our cities ensure that the water delivered to our buildings is clean and safe for consumption, once that water reaches private property it becomes the responsibility of the owner(s).

By treating water as it comes into the building we can now be more pro-active in controlling the causes of early corrosion and pipe failure rather than being left vulnerable to deal with symptoms as they occur. Installing a system that treats water before entering the water distribution system ensures that every pipe and mechanical component within has a reasonable chance to reach the desired lifespan.

Using an experienced, well qualified and licensed water treatment contractor to install and manage your system is an affordable option when compared to the cost of an early pipe failure replacement and on-going repair and damage costs.

It is essential that your contractor has the ability to monitor your water as it enters your system and the means to safely adjust and maintain optimum levels of both pH and natural buffering minerals, to provide optimum protection of piping systems while retaining perfect quality at the tap.

Doreen Robertson is a Vancouver Island Representative with Hytec Water Treatment, and can be reached at doreen@Hytecwater.com

PUBLIC CONSULTATION ON COMPLEX STRATAS

With the publication of its Consultation Paper on Complex Stratas, the British Columbia Law Institute's Strata Property Law Project Committee is asking the public for its views on proposed reforms to the Strata Property Act and the Strata Property Regulation concerning sections, types, and phases.

"Sections and types allow a strata corporation to manage cost sharing between groups of owners, while phases permit the development of a strata property in segments over an extended time," explained committee chair Patrick Williams. "These tools are important for creating and sustaining sophisticated, architecturally varied, or mixed-use stratas. With this consultation, the public has the first chance in a generation to consider and comment on a comprehensive list of needed reforms to sections, types, and phases."

The consultation paper has 68 tentative recommendations for reform, including:

- 29 tentative recommendations on sections, which propose clarifying the procedures for creating and cancelling sections, spelling out section powers and duties, and strengthening section governance, budgets, and finances;
- 14 tentative recommendations on types, which propose clarifying the procedures for creating and cancelling types and fine-tuning the operation of types; and
- 25 tentative recommendations on phases, which propose enhancing the oversight of the phasing process, simplifying governance in a phased strata corporation, and providing additional protections for the financial interests of owners in a phased strata property.

The full consultation paper, a summary consultation, a response booklet, a backgrounder, and a link to the survey are all available at www.bcli.org. The consultation is open until 15 January 2017. BCLI strives to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform.

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You Asked

Who is Responsible for Owner-installed Balcony Enclosures?

By David Grubb

Q: My strata has decks on some units, which are part of the strata lots. It has been determined in an engineer's report that deck enclosures added by individual owners must be removed. Council is asking all strata owners to pay for removing the deck enclosures from private property. I am not happy about this as I don't have a deck and don't like having to pay for work on others' decks. Is the deck surface the responsibility of the unit owner to maintain and replace deck surface? Is the strata corporation responsible for the interior of these enclosures?

A:

Your strata was registered originally under the *Condominium Act* (CA). That Act specified that balconies (amongst other areas) must be included as part of the strata lot, unless they were designated as common property which was not the usual practice at the time.

Sections 115 (c) and 116(f) of the CA also specifically made the owner responsible for the maintenance of the strata lot including balconies, and exempted the strata corporation from doing so:

Duties of owner

115. An owner must do all of the following:

(c) repair and maintain the strata lot, including windows and doors, and areas allocated to the owner's exclusive use, and keep them in a state of good repair, reasonable wear and tear and damage by fire, storm, tempest or act of God excepted;

Duties of strata corporation

116. A strata corporation must do all of the following:

(f) maintain and repair the exterior of the buildings, excluding windows, doors, balconies and patios included in a strata lot, including the decorating of the whole of the exterior of the buildings;

Section 115(h) of the CA also permitted the owner to alter the exterior, which presumably would include erecting a balcony enclosure:

(h) receive the written permission of the strata council before undertaking alterations to the exterior or structure of the strata lot, but permission must not be unreasonably withheld.

It is noted that there was no specification as to who was responsible to repair and maintain that alteration in s.116(f), but given the other CA sections and sub-sections which made the owner responsible, it can be argued that the owner would be responsible also for such an enclosure since it would now become part of the balcony.

It is likely that, although permission was granted, the letters of permission and/or the minutes of the council meeting have been lost to history since the CA did not specify any requirements to retain them and most stratas probably did not think about requiring indemnity agreements.

When the SPA came into effect in 1998, however, the responsibility for maintenance and repair of balconies became a gray area.

The strata was obviously responsible for the common property, and since the exterior walls (in most cases) are common property as defined by SPA s.68, the responsibility of the strata to maintain and repair them was mandated under SPA s.72(1):

Strata lot boundaries

68 (1) Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of

Continued on page 13

Continued from page 12

the structural portion of the wall, floor or ceiling that faces the other strata lot, the common property or the other parcel of land.

Repair of property

72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.

(2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of

(a) limited common property that the owner has a right to use, or

(b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.

(3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

However, SPA s.72(3), when combined with Standard Bylaw (8)(d)(iii) and (iv), and despite Standard Bylaw 2(1) could arguably make the balconies and therefore the enclosures the responsibility of the strata to maintain and repair even though they are part of the strata lot:

Repair and maintenance of property by owner

2 (1) An owner must repair and maintain the owner's strata lot, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws.

Repair and maintenance of property by strata corporation

8 The strata corporation must repair and maintain all of the following:

(d) a strata lot in a strata plan that is not a bare land strata plan, but the duty to repair and maintain it is restricted to

(i) the structure of a building,

(ii) the exterior of a building,

(iii) chimneys, stairs, balconies and other things attached to the exterior of a building,

(iv) doors, windows and skylights on the exterior of a building or that front on the common property, and

(v) fences, railings and similar structures that enclose patios, balconies and yards.

So the question is, "If the balcony and its enclosure were part of the strata lot under the CA and the responsibility of the owner to repair and maintain, has that changed under the SPA Standard Bylaw 8(d) such that strata corporation is responsible for the balcony and the enclosure which may be considered a "fixture"?"

The BC Strata Property Practice Manual, a publication written and regularly updated by lawyers who specialize in strata law, makes the following comment:

D. Balcony Enclosures

Where an owner encloses a balcony, there may be a finding that the enclosure is a fixture and becomes part of the common property, regardless of the area enclosed. A strata corporation may be able to defeat this result by an agreement with the owner that provides that the enclosure is an item of tangible personal property.

To circumvent the possibility of an enclosure being such a "fixture", some stratas have amended their bylaws to specifically designate balcony enclosures (and other alterations to the strata lot) which may have been made before the SPA came into effect as remaining the responsibility of the strata lot owner, not the strata corporation.

If your strata does not have such a bylaw amendment, then the issue of the enclosures can be argued either way, and I can only recommend that you and the strata council consult a lawyer who specializes in strata law to determine if there is any way to resolve this question.

Finally, as far as I can see, if an owner has enclosed the balcony and turned it into some kind of "living space" then the strata should not be held responsible for the interior. Moreover, if the owner has tampered with the building envelope in some way, there could be legal ramifications if that alteration Has caused a problem with the structure of the building.

Regardless of who pays for the removal of the enclosure, you would be well advised to check with your municipality regarding replacing it with a new enclosure. Modern building codes have caused municipalities to put strict regulations in place which might inhibit, if not prohibit, such a reconstruction.

ELECTING COUNCIL MEMBERS - A MAJORITY VOTE IS NOT REQUIRED

By Gerry Fanaken

Since 1966, when strata legislation took effect in British Columbia, the vast majority of strata councils have been elected at annual general meetings via a simple, straightforward, democratic electoral process. However, in recent years, some strata corporations have adopted a policy of requiring owner-nominees to obtain a majority vote (50% +1) in order to be elected. This policy is premised on Section 50 of the *Strata Property Act* which states that "At an annual or special general meeting, *matters are decided* (emphasis added) by majority vote…". (Majority vote is defined in Section 1 of the Act as "…a vote in favour of a resolution by more than ½ of the votes cast by eligible voters…".)

Section 25 of the Act mandates that a strata corporation have a strata council. Specifically it states "At each annual general meeting the eligible voters who are present in person or by proxy at the meeting must elect a council." Bylaw 28 of the Standard Schedule of Bylaws of the Act sets out the order of business at an AGM or SGM and this includes the election of a strata council.

So far so good - but the problem arises with the expression "*matters* are decided".

I submit that the election of a strata council is not a "matter". An election is an election: it is not a business or administrative "matter" to be decided in the same context of a subject under consideration by the owners, or a resolution to address an issue or a disagreement, or a subject requiring a decision. The owners are specifically directed by the Act (pursuant to Section 25) to elect a strata council. There is no option to this direction (i.e. "Let's have a majority vote at this AGM to decide whether or not we want to elect a council.") and the meeting must fulfill the obligation prescribed by the statute. Other "matters" may come before the owners at the AGM or SGM and, fair enough, these require a majority vote to succeed as specified by Section 50. But electing a strata council is not in this domain: it is not a matter to be decided.

An electoral process at an AGM which requires a nominated owner to achieve 50% +1 on the ballot is a misreading of Section 25. As outlined above, an electoral proceeding is not a matter to be decided. Moreover, a strict interpretation and application of Section 50 creates an absurdity. It is rare to see nominees achieve 50% +1 at AGMs. Typically one or two "popular" candidates will reach this bar and the remaining nominees achieve something less. And that is perfectly logical. Where a bylaw requires up to seven members, (and for example, say that 10 owners are nominated at the AGM), the seven nominees with the most votes (relative to all 10 nominees) are elected. It is this procedural fairness and logic that is required in a strata council electoral proceeding. The legislators surely did not envision that each nominee receive 50% +1 to be elected. To interpret the Act in such a narrow reading would almost invariably (in practice) lead to no strata councils being elected.

Most strata corporations rely on the standard bylaw requiring between three and seven owners to form the council. Where strata corporations conclude

Continued on page 15

Continued from page 14

that a seven-member council is too big, consequential amended bylaws almost invariably reduce the maximum from seven to a smaller number such as five. (It is virtually non-existent to see bylaws requiring less than three members.) Thus, if Section 50 is used as a platform, in the vast majority of strata corporation elections irrespective of the size of the strata council under the bylaws, the reliance on 50% +1 would result in no strata councils being elected since it is highly unusual to see more than one or two owners receive 50% +1.

The harsh reality of requiring a majority vote to be elected by some strata corporations relying on Section 50, is that this application is frequently used as a tactic to prevent certain owners from being on the council. It is ironic, since the very nature of condominium governance requires broad owner participation and volunteerism. An "establishment" group often raises roadblocks to prevent newcomers to the council, particularly if those newcomers have opposing views and/or challenge the status quo. Such owners may receive support from the general meeting but not to the extent of 50% +1 and they are therefore easily dismissed as having failed to meet the requirements of Section 50. This practice is essentially political and not in keeping with the spirit of the legislation.

An election of owners to the strata council is not a "matter" to be decided since it is a statutory requirement. The conventional governance practice of calling for an unlimited number of owner nominees at an AGM to be considered with the top seven candidates with the highest votes being elected must stand as the proper electoral process. To insist that a majority vote for each nominee must be achieved is a misreading of the legislation.

Gerry Fanaken was the CEO of Vancouver Condominium Services Ltd., managing about 165 strata corporations. He is a frequent guest speaker and contributor to strata associations in BC. Gerry has been a strata owner since 1974 and welcomes your comments. He can be reached at gfanaken@shaw.ca

President's Report

As fiscal 2016 comes to a close, it is that time of year when we reach out to our members for potential new board members for the coming year. One position we do need to fill is a telephone Helpline responder. David Grubb is the main email responder of our Helpline, along with Gloria Martins; and most of you know Harvey Williams as the voice of our telephone Helpline. Harvey is looking to lighten his volunteer tasks and so a new phone responder, ideally a board member, is needed. You don't need to know the *Strata Property Act* verbatim as Harvey does, but a good working knowledge is needed.

In addition, there are other working groups that each of us serves on, and additional hands are always appreciated. Those groups are: Advertising; Bulletin; Government and External Stakeholder Relations; Marketing; Memberships (General); Memberships (Business); Outreach; Nominations; Publications; Seminars; Social Media; Website; Workshops.

Last month the board unanimously voted one new member to join the board: Betty-Ann Rankin is a retired Administrator, formerly with the Provincial Government and has lived in stratas for over 25 years, serving on council during many of those years.

Welcome Betty-Ann!

This is also the time of year when we plan our budget for the upcoming fiscal year, to present to you, our members, at our AGM February 26th. We expect to end the year with a small surplus. We will soon be planning our seminar and workshop topics for next year, and you may have thoughts on new ways to present education to strata owners.

If you have an interest in serving on your board; any ideas or suggestions for new projects for the coming year; or insights for new seminar or workshop topics, please email me. I'm always glad to hear from you.

president@visoa.bc.ca
Sandy Wagner

Volunteering is the ultimate exercise in democracy. You vote in elections once a year, but when you volunteer, you vote every day about the kind of community you want to live in.

~ Marjorie Moore

~ DISCLAIMER ~

The material in this publication is intended for informational purposes only and cannot replace consultation with qualified professionals. Legal advice or other expert assistance should be sought as appropriate.

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