



Strata Property Agents – Liability Issues

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STRATA PROPERTY AGENTS – LIABILITY ISSUES

I. INTRODUCTION

The *Strata Property Act* (the “Act”) came into force on July 1, 2000. It contained numerous substantive changes to condominium law as established by the *Condominium Act*. Most of the changes are directed to towards owner developers and strata lot owners, but many will have direct impact on the practices and obligations of strata property agents. This paper focuses on the changes in condominium law that result in an increased work load on strata property agents, those that have the potential of increasing the liability of strata property agents in an increasing litigious world, and the steps that strata property agents or their lawyers should take to address those issues.

II. INTERIM BUDGET

The owner developer must prepare an interim budget for a 12 month period. This budget must be delivered by the owner developer to all purchasers. The interim budget must include all sources of revenue, expenses, contributions to the contingency reserve and each strata lot’s share of those expenses (sec. 13). The strata corporation begins paying the expenses that accrue beginning the first day of the month following the first conveyance to a purchaser (sec. 14(1)).

If the expenses for the period commencing with the first conveyance and ending when the first annual budget is adopted, are greater than the operating expenses set out in the interim budget, the owner developer must pay the difference to the strata corporation within 8 weeks after first annual general meeting (sec. 14(4)). If the actual operating expenses are more than 10% greater, but less than 20% greater than the expenses as set out in the interim budget, the owner developer must pay the difference plus 2 times the difference (i.e. pay 3 times the difference) to the strata corporation (sec. 14(5), reg. 3(1)(a)). If the operating expenses are more than 20% greater than the estimated expenses in the interim budget, the owner developer must pay the difference plus 3 times the difference (i.e. pay 4 times the difference) to the strata corporation (sec. 14(5), reg. 3(1)(b)).

If the operating expenses are less than those set out in the interim budget, the strata corporation must refund the money to the owners, unless each owner would get less than \$100, in which case the surplus goes into the contingency reserve (sec. 14(6) and (7)).

A. Impact On Strata Property Agents

The imposition of penalties on developers who under-estimate their strata corporation’s expenses makes it more important than ever that the interim budget be accurate. If there are differences between the interim budget and the actual expenses, the owner developer may face penalties of up to 4 times the difference. To the extent that the strata property agent had any role in drafting the interim budget, the developer may make a claim against the strata property agent for negligent advice in preparing the budget. When drafting an interim budget for an owner developer, a strata property agent should add a written disclaimer, advising the owner developer of the uncertainty regarding costs, and expressly stating in writing that the strata property agent is not liable for any potential penalties. If the owner developer pressures the strata property agent to reduce the

estimated costs so as to reduce the monthly strata fees that they must market, the strata property agent should advise the owner developer of the consequences, and expressly state in writing that they are doing so at owner developer's direction and that they are not responsible for the consequences.

III. OWNER DEVELOPER'S RECORDS – STRATA CORPORATION RECORDS

Under the Act, the owner developer must provide the strata corporation with copies of the following documents, at the first annual general meeting (s. 20(2)):

- (1) all building permit plans and amendments;
- (2) any other plans showing changes (as built plans if available);
- (3) all contracts entered into by or on behalf of the strata corporation (management agreements, elevator service construct, leases etc.);
- (4) the *Real Estate Act* disclosure statement;
- (5) the registered strata plans as obtained from Land Title Office;
- (6) names and addresses of all contractors, subcontractors and suppliers (reg. 3.2), contractors, subcontractors of major systems (electrical, heating, plumbing, elevators, exterior walls, windows and doors, roof and foundations), technical consultants, building envelope specialists, and the project manager;
- (7) all warranties, manuals, schematic drawings, operating instructions, service guides, manufacturers information regarding construction, installation operation, maintenance, repair and servicing of common property or common assets;
- (8) the section 35 records (council minutes, etc.);
- (9) all other documents required by the regulations.

If the owner developer does not supply the above listed documents to the strata corporation and the strata corporation must pay money to third parties to obtain copies of the documents, the owner developer must pay the cost of obtaining the documents to the strata corporation (sec. 20(3)).

The Act requires that the strata corporation (and hence its strata property agent), maintain records for prescribed periods of time (sec. 35(2)). The strata property agent must deliver to the strata corporation all of its records and documents that are in the strata property agent's possession or control within 4 weeks of the termination of their property agency contract (sec. 37).

B. Impact On Strata Property Agents

The strata property agent will be the one who will have to manage this document flow. If documents cannot be found, people will likely point to the strata property agent as the party who lost them. The strata property agent should develop a checklist of what they expect to receive from the owner developer. They should provide that checklist to the owner developer before the owner developer starts construction. Even though the Act has been in place for almost two years, owner developers still need to educate themselves and their contractors and suppliers as to what documents must be retained and transferred to the strata corporation. The strata property agent should inventory the documents that the owner-developer provides to the strata corporation at the first annual general meeting and get the owner developer and strata council to acknowledge (in writing) that inventory list.

The material provided by the owner developer to the strata corporation may be stored by the strata property agent, but there is no reason why it cannot be stored on the strata corporation property. The strata property agent can pass some of the costs of storage directly onto the strata corporation by having them purchase the necessary filing cabinets and store the documents on the premises in a common room, the on-site manager's suite or a strata council member's suite. The documents should only be stored on the site once the documents have been inventoried and the appropriate document management procedures have been established. If the strata property agent has the strata corporation store the material on site, it is important that the strata council acknowledge what material the strata property agent gave them.

The strata property agent must ensure that they are familiar with the various categories of documents that must be retained and the different document retention periods set out in the Act and the regulations, so that they retain the documents for the appropriate periods of time.

When a strata property agent's contract expires or terminates, they must turn over all of the documents provided by the owner developer plus those records that the strata property agent has maintained under its contract with the strata corporation, to the strata corporation within 4 weeks of the termination of the contract. If strata property agent fails to turn over the documentation, the strata property agent is liable to pay a fine of \$1000 to the strata corporation for failing to turn over the documents (sec. 37(2), reg. 4.3). It is therefore important that the strata property agent has the strata council or the new strata property agent acknowledge receipt of the documents to avoid any dispute as to what documents were turned over.

IV. THE FIRST ANNUAL GENERAL MEETING

A. Prior To The First Annual General Meeting

From the time of the first conveyance until the first annual general meeting, the owner developer cannot enter into contracts on behalf of the strata corporation with either itself or a non-arms length person, unless the agreement is approved by a unanimous vote of the owners. Such agreements would include strata management agreements, rental pool agreements, transfers of strata managers suites, vendor take-back mortgages on strata manager's suites, easements with adjacent

developments, parking facility leases and so forth. All of these agreements should be finalized, approved and executed prior to the first conveyance.

B. Timing

The first annual general meeting must be held during the 6 week period beginning on the earlier of: (a) the conveyance of 50% plus 1 of the strata lots; and (b) the date that is 9 months after first conveyance to a purchaser, not 9 months after the filing of the strata plan (sec.16 (1)). The owner developer must give notice of the annual general meeting to all owners and include with the notice the proposed budget and financial statements (sec. 16 and 21). If the owner developer does not call the first annual general meeting within this period, an owner can call and hold the meeting upon compliance with notice requirements of the Act (sec.17 and 45). The owner developer must pay to the strata corporation a penalty of \$1000 if the annual general meeting is delayed for a period of up to 30 days after the specified period, and \$1000 for each further 7-day delay (sec. 17, Reg. 3.1(2)).

C. Monies Owing By The Owner Developer

Any money owed by the owner developer to the strata corporation (budget vs. actual expenses, late annual general meeting, failure to provide documents) is money owing and the strata corporation may lien one of the owner developer's lots (sec. 18, 112 to 118).

D. First Annual Budget

The first annual budget covers the one-year period commencing on the first day of the month following the annual general meeting. The proposed first annual budget is to be distributed with the notice of the first annual general meeting (sec. 21). The budget and financial statement must contain the information provided in section 3.3 of the Regulations (sec. 21(3)). While this information was generally contained in most budgets, some smaller projects traditionally have had significantly less information in their budgets.

The budget must be approved by a majority vote (sec. 21(4)). Within 8 weeks of the first annual general meeting, the owner developer must provide the strata corporation with updated financial statements, updated to date the first budget takes effect, or the date of the first annual general meeting if no budget is adopted (sec. 21(6)).

E. Contingency Reserve

The owner developer must fund the contingency reserve at the time of the first conveyance (sec. 12(1)). This requirement is not applicable to developments where the disclosure statement was filed prior to July 1, 2000 (reg. 17.3). If the first conveyance occurs within one year of the filing of the strata plan in the Land Title Office, the owner developer must pay an amount equal to 5% of the estimated annual operating expenses as set out in the interim budget. If the first conveyance is more than 1 year after the filing of the strata plan in the Land Title Office, the owner developer must pay to the strata corporation the lesser of: (a) 5% of annual operating expenses times the number of years or partial years since the filing of the plan; or (b) 25% of the estimated annual operating expenses (sec. 12(3)).

The strata corporation may not use the contingency reserve funds until after the first annual budget is approved (sec. 14(3)).

F. Transfer To Council

Within one week of the first annual general meeting, the owner developer must transfer the strata corporation's money to the new council and deliver keys, garage door openers and other access devices, to the strata council (sec. 22).

G. Access To Owner Developer's Financial Records

For 2 years following the transfer of control to the strata corporation, the owner developer must keep financial records that relate to the strata corporation's finances during the period before the transfer (sec. 23(1)). During this period, the owner developer must provide the strata corporation with free access to the financial records but can charge the strata corporation for the cost of copying the documents (sec. 23(2)).

H. Pursuing Owner Developer's Warranties

The owner developer must take reasonable efforts to pursue any remedies under warranties in existence regarding construction of the common property and common assets (sec. 6(2)). Warranties periods will vary but they are often limited to one year or less so any action must be commenced promptly.

I. Impact On The Strata Property Agent

The Act provides greater flexibility than under the *Condominium Act*, for the owner developer in calling the first annual general meeting. A strata property agent who has a relationship with an owner developer should ensure that they have advised the owner developer of the penalty provisions set out in the Act for failing to hold the annual general meeting when required. The not uncommon practice of delaying the annual general meeting while the owner developer continues to pay all of the strata corporation's expenses is not permitted under the Act (not that it was permitted under the *Condominium Act*). If the owner developer fails to call the annual general meeting, the strata property agent should work with the other owners to call the meeting, as the strata property agent's duty is owed to the strata corporation, not the owner developer. If the owner developer does not hold the meeting when required, the strata property agent should advise the incoming strata council of the right to pursue the penalty imposed under the Act (sec. 17(b) and reg. 3.1(2)).

The strata property agent should also ensure that the owner developer is aware of its obligation to prepare and distribute the first annual budget and the financial statements with the notice of the first annual general meeting. The budget and financial statements should include all information required by the Act. The strata property agent should also make the owner developer aware of the obligation to submit the updated financial statements.

The strata property agent should ensure that when the owner developer pays the strata corporation's monies over to the strata corporation, it includes the contingency reserve contribution, and any other monies owed by the owner developer to the strata corporation. If it does not, the strata

property agent should review with the strata council, the remedies the strata corporation has, including suing the owner developer.

The strata property agent should ensure that the strata corporation identifies any construction deficiencies and defects as soon as possible and examine if any of the owner developer's warranties are going to expire. If there are deficiencies and defects, the owner developer needs to be advised and encouraged (or forced) to pursue the warranties provided by its contractors.

V. SECOND ANNUAL GENERAL MEETING

A. Strata Management Contracts

The first strata property management contract ends (regardless of the terms of the contract) on the earlier of:

- (1) four weeks after the date of the second annual general meeting (unless a majority vote confirming the contract is obtained);
- (2) the termination date in the contract;
- (3) cancellation date provided in section 39 being 2 months' notice after a 3/4 vote at an annual or special general meeting (sec. 24).

B. Impact On The Strata Property Agents

The strata property agent should ensure that they get the extension of their contract approved at the second annual general meeting. A strata property agent probably has a positive duty to place the renewal of the contract on the agenda and advise the strata council and the owners of the fact that the contract will be terminated if it is not approved by a majority vote at the second annual general meeting. A prudent strata property agent will deal with the strata council on this issue well in advance of the meeting.

If the renewal of the contract is not addressed at the second annual general meeting, and the strata property agent continues to work after the meeting, the contract nonetheless remains terminated. The strata property agent may have a basis for a claim based upon unjust enrichment or quantum meruit, if the strata property agent continues to work and is not paid.

VI. MEETINGS

A. Waiver Of Meetings And Notices Of Meetings

Meetings can be waived entirely if all eligible voters consent in writing to waive the meeting and consent to any proposed resolution (sec. 41 and 44).

A strata corporation must give at least 2 weeks' written notice of all meetings (sec. 45). Persons who have a right to be notified can waive the right to notice of a meeting, but they are free to revoke that

waiver in writing at any time (sec. 45(2)). When waivers are obtained they must be obtained from all of the owners of a strata lot, not just one of the co-owners (sec. 41(2) and 44(2)).

The items that are to be included in notices of meetings have been expanded. Notices must include a description of all matters to be voted on and the proposed wording of any resolution requiring a $\frac{3}{4}$ vote or a unanimous vote (sec. 45(3)).

B. Meetings By Telephone

A strata corporation may in its bylaws allow for attendance at meetings by telephone or any other method that permits persons participating in the meeting to communicate with each other (sec. 49).

C. Council Members

All owners, individuals representing corporate owners, and certain tenants are eligible to sit on the strata council (sec. 28(1)). A strata corporation can adopt bylaws that allow other classes of persons to sit on council such as spouses or family members of an owner, professional advisers etc. (sec. 28(2)). A strata corporation can pass a bylaw disentitling a person from standing for or sitting on council, if the strata corporation is entitled to register a lien against their strata lot (sec. 28(3)). If more than one person owns a strata lot, only one of the co-owners may sit on council at any one time with respect to that lot, unless all owners are on council (sec. 29(2)).

Members of strata councils must act honestly and in good faith with a view to the best interest of the strata corporation and exercise the care and diligence of a reasonably prudent person in comparable circumstances. Council members who have a direct or indirect interest in a contract or transaction must not only disclose such interest fully, but also abstain from voting on the matter and leave the council meeting when the matter is being discussed and determined (sec. 32).

D. Proxies

Proxies must be made in writing and signed by the persons giving them. The Form A - Proxy Appointment is not a mandatory form and parties are free to use other forms of proxies. The proxy may be general, for a specific meeting or for a specific resolution. The Act provides that proxies may only be held by an employee of a strata corporation or the strata agency firm if permitted by the regulations (sec. 56). As no permission has been included in the regulations, strata property agents and strata property agencies cannot hold proxies.

The Act does not specifically permit or prohibit, proxies being held by a company or person related to the strata property manager. However doing so, is probably contrary to the public policy reasons behind the provision and it is a risky and unwise move. The proxies should be given to strata council president or secretary, the owner developer or a third party to vote.

E. Delayed Implementation Of Resolutions Requiring A $\frac{3}{4}$ Vote

Where a resolution requires a $\frac{3}{4}$ vote and it is adopted by persons holding less than 50 percent of the votes, and within one week following the adoption of the resolution, persons holding at least 25

percent of the votes demand a reconsideration of the resolution (excluding defaulting owners who are not entitled to vote (sec. 53(3)), the resolution must be put to a further vote.

F. Unanimous Resolutions

Unanimous resolutions under the Act require a vote in favour of the resolution by all eligible voters, not just those present at the meeting (sec. 1(1)). There is no delayed meeting procedure like there was in section 48 of the *Condominium Act*. It should also be noted, that a bylaw that provides that a person cannot vote, when in default in the payment of strata fees etc., cannot restrict an owner from voting on a resolution that requires a unanimous resolution (sec. 52). There is however an option to have a court dispense with the requirement for unanimous approval in certain circumstances (sec. 52).

G. Hearings

A strata corporation may remedy a contravention of its bylaws and bill the cost of such action to the owner or the owner's tenant (sec. 133). A strata corporation may deny owners or tenant's access to recreational facilities if the bylaw breach relates to that facility (sec. 134). Before levying a fine or requiring the owner to pay the cost of remedying a contravention, the person is entitled to have written particulars of the complaint provided to them and an opportunity to answer the complaint, including a hearing if requested (sec. 135).

H. Impact On Strata Property Agents

Meetings of the owners now require a longer lead-time and the strata property manager will have to consider this when scheduling meetings.

The strata property agent should advise strata council members of the new rules relating to conflict of interest and ensure that they absent themselves when discussions and votes take place on matters in which the owner has an interest.

Strata management representatives can sit on the strata council as a corporate owner's representative on council though this is a bad idea given the obvious potential for conflicts of interest to arise.

Proxies should be granted to the strata council members not the strata property agent. While the Act does not expressly prohibit a related company of the strata property manager (such as its real property management company that manages suites on behalf of investor owners), from holding proxies, this is contrary to the public policy behind the restriction on proxies and any bylaw or resolution adopted using such proxies is open to challenge. There would be no contravention of the public policy behind section 56, if a strata agency firm holds proxies for a project it does not manage. If a strata property agency firm insists on holding proxies for its projects, it should at a minimum hold them thorough an affiliated or subsidiary company.

Where resolutions require a $\frac{3}{4}$ vote and are approved by fewer than 50 percent of the owners, the resolution should not be implemented until the one-week period for a potential second vote, has expired.

Hearings are defined as being an opportunity to be heard in person at a council meeting and make an oral presentation (reg. 7.2). The Act is silent as to whether an owner is permitted to have a lawyer attend the hearing, but is likely that a court would rule that they are so entitled, particularly on significant matters. The strata property agent may not be qualified to run that hearing and they should either advise the strata council to obtain legal advice or let the strata council run the hearing themselves. If the complaint is regarding a strata council member's action, that strata council member cannot participate in the hearing (sec. 136).

VII. INFORMATION CERTIFICATE

Upon a request of an owner or purchaser the strata corporation must give a Form B - Information Certificate to the owner or the purchaser (sec. 59(1)). The Form B - Information Certificates are much more detailed than the old section 36 certificates and must provide, inter alia, the following information:

- (a) the amount of the strata lot's monthly strata fees;
- (b) the amount owed to the strata corporation by the strata lot owner;
- (c) any agreement whereby the owner is responsible for additional expenses relating to the strata lot, the common property or the common assets;
- (d) any approved special levies and the date they are to be paid;
- (e) the amount by which the expenses for the current fiscal year are expected to exceed the budget;
- (f) the amount in the contingency reserve fund minus any expenditures that have been approved but not yet been taken from the fund;
- (g) any amendments to the bylaws not yet filed in the Land Title Office;
- (h) any resolution passed by a $\frac{3}{4}$ or unanimous resolution that has not yet been filed in the Land Title Office;
- (i) notice of any $\frac{3}{4}$ or unanimous resolutions not yet voted on;
- (j) any court proceeding to which strata corporation is a party;
- (k) any work orders relating to the strata lot, the common property or the common assets that remains outstanding; and
- (l) the number of strata lots in the strata plan that are rented.

The rules of the strata corporation, the current budget and the owner developer's rental disclosure statement must be delivered along with the Form B - Information Certificate. The strata corporation may charge any party requesting the Form B - Information Certificate \$35.00 plus the

cost of photocopying the documents at a rate of \$.25 per page (sec. 59(7), reg. 44). The Form B - Information Certificate must be provided within one week of its request.

Parties receiving a Form B - Information Certificate are entitled to rely on it and it is binding on the strata corporation and if there is any incorrect information, the strata corporation is liable for such misrepresentation (sec. 59(5)). There is a provision in the Act for a court to grant relief from the consequences of such reliance (sec. 59(6)).

B. Impact On Strata Property Agents

The Form B - Information Certificate imposes significantly more work on the strata corporation and the strata property agent who must collect and provide the information. It should be noted that while some of the information is similar to that provided with a section 36 Certificate under the *Condominium Act*, the Form B - Information Certificate requires not just factual information but some information that requires the strata corporation or strata property agent, to exercise their judgment and even predict future events. For example item (e) provides that the strata corporation must advise of the amount by which expenses for current fiscal year are expected to exceed the budget. This may be very difficult to predict, particularly as the strata council may exercise its discretion to trim the budget on some matters later in the year if they go over budget earlier in the year.

While the Form B – Information Certificate is a prescribed form, a strata property agent can qualify the information when completing the form. For example, they can add language that qualifies the information in a Form B – Information Certificate, in the cover letter that is sent with the Form B - Information Certificate. If the qualification language is in the cover letter, it should be drawn to the recipient's attention by a note or warning stamped on the Form B - Information Certificate

The strata property agent must ensure that their information systems include all of this information required. There must be closer links between the strata property agent and the clerk that provides the Form B - Information Certificate's to ensure that the information is kept current. The strata property agent must pass the information on to the clerk the day after council meetings, not weeks later, so that the information can be kept current.

The strata property agent's contract with the strata corporation should provide that the strata property agent can charge the maximum fee for issuing a Form B allowed by the Act, and that they are entitled to retain the fee on their own behalf and not as agent of strata corporation.

The strata property agent's contract should also provide that the strata property agent is acting as agent for the strata corporation when providing the Form B -Information Certificates. The contract should obligate the strata corporation and the owners to keep the agent advised of all the relevant information that must be disclosed in a Form B - Information Certificate and that the agent is to be advised of any changes to any of the information that is set out in a Form B - Information Certificate. Provided the strata property agent has acted honestly and in good faith when preparing the Form B - Information Certificate - Information Certificate, they are less likely to be held responsible for any inaccuracies in preparing the Form B - Information Certificate.

Where an owner, realtor or potential purchaser is seeking information that goes beyond that set out in the Form B, the strata property agent must be very careful. They should only disclose information in accordance with the Act and must respect the privacy of the strata corporation and its owners. Inquiries should be referred to the strata council where they fall outside this area. Strata property agents should not make conclusions or express opinions to the public.

VIII. BYLAWS AND RULES

A. Bylaws And Rules

The bylaws of a strata corporation are the Standard Bylaws unless different bylaws are filed in the Land Title Office (sec. 120). The owner developer may file different bylaws in the Land Title Office when depositing the strata plan (sec. 120). Bylaws may not: (a) contravene the Act, the regulations, the Human Rights Code or any other laws; (b) destroy or modify the statutory easements; or (c) prohibit the right of an owner to freely sell, lease, mortgage or dispose of strata lot (sec. 121). Bylaws may however, restrict rentals (sec. 141), marketing activities related to the sale of a strata lot including the location of signs and times for showing common property and holding open houses (sec.122), or restrict the age of occupants to ages 55 and over (sec. 121).

Bylaws restricting pets are permissible but bylaws prohibiting pets do not apply to pets living with owner, tenant or occupant at the time the bylaw is passed as long as the pet continues to live there (sec. 123(1)). Bylaws restricting the age of residents do not apply to persons who reside in strata lots at the time the bylaw is passed and who continue to reside in strata lot after its adoption (sec 123(2)).

A strata corporation may adopt a voluntary dispute resolution bylaw (sec. 124).

A strata corporation may adopt rules that govern the use, safety and conditions of common property. The strata council may adopt the rules, provided they are approved at the next annual general meeting by the owners (sec. 125).

B. Amending The Bylaws

If the strata project is a bare land strata plan or a purely residential strata plan, the bylaws cannot be amended before the first annual general meeting unless the amendments are approved unanimously at a special meeting (sec. 127(1)). If all of the strata lots are non-residential, the bylaws may be amended prior to the annual general meeting at a special meeting with a 3/4 vote (s. 127(2)). If it is a mixed-use project, the bylaws can be amended with unanimous approval unless there are separate sections for the non-residential and residential units and the amendments are unanimously approved by residential units and by a 3/4 vote by the non-residential sections (sec 127(3 & 4)). Bylaws otherwise require 3/4 approval, and if in a development with separate residential and non-residential sections, bylaw amendments requires 3/4 approval by both the residential and non-residential sections (sec. 128).

C. Enforcing The Bylaws And The Rules

A strata corporation may impose fines, remedy contraventions or deny access to recreational facilities (sec. 129). Fines may be levied both against owners and tenants, and fines levied against tenants may be collected from the owner of the strata lot (sec. 130 and 131). The strata corporation may impose fines against owners and tenants for visitors and occupants conduct (sec. 130). The maximum fines must be set out in a bylaw and they cannot exceed the amount in the regulations (sec. 132, reg. 7.1), which provide for a \$200 fine for each contravention of a bylaw and \$50 for each contravention of a rule. There is a separate maximum fine that may be levied regarding the rental of a strata lot contrary to a rental restriction bylaw of \$500. The maximum frequency of fines for continuing contraventions is every 7 days.

A strata corporation may remedy a contravention and bill the costs to the owner or tenant (sec. 133). A strata corporation may deny access to recreational facilities, but only if the bylaw breach relates to that facility (sec. 134). Before levying a fine or requiring the owner to pay cost of remedying a contravention, the person is entitled to have written particulars of the complaint and an opportunity to answer the complaint, including a hearing if requested (sec. 135). If the complaint is regarding a strata council member, that strata council member cannot participate in a hearing (sec. 136).

Repeated breach of a reasonable and significant bylaw by a tenant of a residential strata lot, entitles a landlord to terminate the tenancy under section 36(11) the *Residential Tenancy Act* (sec. 137). A strata corporation may also terminate the residential tenancy in these circumstances (sec. 138).

D. Transitional Provisions

Bylaws of strata corporations created before July 11, 2000 continued in full force and effect until January 1, 2002. The bylaws of a strata corporation that only had the Part 5 bylaws under the *Condominium Act* are deemed to be replaced by the Standard Bylaws effective January 1, 2002. Where a strata corporation has filed bylaws in the Land Title Office, they remain valid unless the bylaws are inconsistent with the Act, in which case those that are in conflict cease to have effect as of January 1, 2002.

E. Impact On Strata Property Agents

A strata property agent should have encouraged their strata corporations to establish a bylaw committee long before January 1, 2002 to review their existing bylaws and rules and the Schedule of Standard Bylaws, to develop a new set of bylaws and rules for the project prior to January 1, 2002. If that was not done it should be done as soon as reasonably possible. In the meantime the strata property agent will have to determine what bylaws govern the project. If there is any uncertainty, legal advice should be obtained.

When amending bylaws, particularly in projects with different sections, care must be taken to ensure that the correct voting requirements are met.

Rules will cease to have any effect, if they are not adopted by the owners at the next annual general meeting. Rules need to be given official status if the strata corporation wants to impose fines or suspend the right to use recreational facilities. The rules posted around the building (recreational

facilities, no smoking policies, parkade speeds, hours of operation of common facilities etc.) will have to be reduced to writing so that they can be provided to tenants and purchasers, and submitted to the owners for approval at the next annual general meeting. Posting the signs will no longer be enough. The bylaw subcommittee should be assigned the task of reducing all rules to writing.

The bylaw committee should also examine the existing structure for imposing fines to ensure it complies with the Act. If not, the necessary changes to the bylaws should be made as soon as possible.

Many of the conflicts that arose when adopting new pet bylaws, age restrictive bylaws and rental restrictive bylaws may be reduced by the fact that they are not now immediately effective against existing owners, tenants and pets.

IX. RENTALS

An owner developer, who intends to rent residential strata lots, must file a rental disclosure statement (Form J) with the Superintendent of Real Estate prior to offering units for sale (sec. 139). Rental disclosure statements may be amended in limited circumstances (sec. 139(2)).

A strata corporation may not screen tenants, establish screening criteria, require approval of the tenants or otherwise restrict the rental of a strata lot (sec. 141). A strata corporation may however adopt a bylaw prohibiting or limiting the number of residential strata lots that may be rented (sec. 141(2)), but rentals to family members are exempted from any such restrictive bylaw (sec. 142 and reg. 8.1). Rental restriction bylaws do not apply to a strata lot until the later of 1 year after the tenant who was occupying the unit at the time of adoption of the bylaw, ceases to occupy it as a tenant or one year after the bylaw is passed (sec. 143(1) and reg. 17.15).

If an owner purchased the strata lot from the owner developer pursuant to a disclosure statement filed prior to July 1, 2000 and the owner developer filed the "usual rental disclosure statement" which permits all units to be rented indefinitely, the bylaw is not applicable until the earlier of the date the strata lot is conveyed by the first purchaser of the strata lot, and the date the rental period as set out in the disclosure statement (usually indefinite) (143(2), reg.17.15). If a strata lot is sold by the first purchaser of the strata lot, and the strata lot was designated as a rental strata lot under the rental disclosure statement, a rental restriction bylaw does not apply until the earlier of (a) the date the rental period expires as set out in the disclosure statement (usually indefinite) or January 1, 2006 (reg. 17.15)

An owner may apply to the strata council for an exemption from the rental restrictions bylaw due to hardship to the owner (sec. 144). The owner is entitled to a hearing.

If a residential tenancy agreement violates a rental restriction bylaw, a tenant may terminate the lease within 90 days of receipt of notice of the contravention of the bylaw, by giving notice to the landlord terminating the agreement (sec. 145).

Before renting a residential strata lot, the landlord must give a prospective tenant the current bylaws and rules and a Form K - Notice of Tenant's Responsibilities and landlord must give a signed copy of the Form K - Notice of Tenant's Responsibilities to the strata corporation within 2 weeks of the

rental commencing. If landlord does not, the tenant may terminate the lease on 90 days notice and landlord must pay the tenants reasonable moving expenses to a maximum of 1 months' rent (sec. s. 146). Where a residential lease has a term over 3 years, the tenant is assigned the landlord's powers and duties (sec. 148(2)).

A. Impact on Strata Property Agents

Old rental restriction bylaws that restricted the number of units that can be rented, but did not prohibit all rentals can be revisited as the Act now allows total prohibition of rentals subject to the transitional provisions and the family member exemption. The bylaw committee of the owners should be assigned the task of looking at the existing rental restrictions bylaws and determining if any changes are necessary or appropriate.

Strata property agents, who manage the rental of residential strata lots on behalf of investor owners, must ensure that they supply the Form K to the strata corporation to avoid providing the tenant with a right to terminate the tenancy agreement.

X. DEPRECIATION REPORTS

Strata corporations may prepare a depreciation report estimating the repair and replacement cost for major items in the strata plan and the expected life of those items to assist it in determining the appropriate amount for the annual contribution to the contingency reserve fund (sec. 94).

Depreciation reports are prepared to assist a strata corporation in determining the appropriate contributions to the contingency reserve, and estimate the repair and replacement cost of electrical, heating, plumbing, elevators, exterior walls, roof, carpet, furniture, painting, parking and recreational facilities (sec. 94, reg. 6.2).

A. Impact On Strata Property Agents

Depreciation reports are not yet mandatory, nor commonplace but they will be seen increasingly. If a strata council ask a strata property agent to prepare a depreciation report, care should be taken to ensure that it falls within the strata property agent's area of expertise. These are very technical reports that may have significant consequences and it is anticipated that architects, engineers or other similar professionals will prepare these reports. It is probably unwise for a strata property agent to prepare these in-house. If recommending other professionals to prepare these reports ensure that they are at arms length and that there is no conflict in referring the strata corporations to them (i.e. no referral fees). Strata property agents should also check to make sure that the parties preparing the reports are qualified and appropriately insured for professional liability. A strata property agent who refers a strata corporation to an unqualified advisor may have potential liability for the advisor's negligence.

Strata property agents should review the advisability of obtaining depreciation reports with its strata council. Failure to get a report may create liability on the part of the strata property agent, particularly if the report could have disclosed a problem that could have been remedied more cheaply if it was discovered earlier.

XI. INVESTMENT OF CONTINGENCY RESERVE AND OTHER MONIES

Contingency reserve funds may now be invested in a far broader category of investments. The allowable investment categories are those set out in section 15 of the *Trustee Act*, and include government securities, certain bonds, investment certificates, preferred shares, and certain types of shares (sec. 95). In times of low returns on saving accounts, strata corporations may be tempted to pursue more aggressive investment strategies.

A. Impact On Strata Property Agents

Strata property agents should discourage strata corporations from pursuing aggressive investment strategies. Locking monies into long-term or non-traditional investments may mean the monies are not accessible when the monies are needed. When investing beyond saving accounts, the investments should be limited to government securities that can be readily accessed when needed. If strata councils are demanding a more aggressive investment strategy, require them to disclose this to the owners and obtain owner approval

XII. INSURANCE

Strata corporations must maintain full replacement value property insurance including major perils and liability insurance of a minimum of \$2,000,000 (sec. 149 and 150, reg. 9.1 and 9.2). Strata corporations may obtain errors and omissions insurance (sec. 151), and other insurance (sec. 152). Strata corporations must review their insurance annually and report on that review at each annual general meeting (sec. 154).

The deductible is a common expense but strata corporations may sue an owner for the deductible if the owner was responsible for loss or damage (sec. 158).

The owner developer must ensure that the term of any insurance must continue for 4 weeks after the first annual general meeting (sec. 15).

A. Impact On Strata Property Agents

The Act now requires liability insurance and insurance coverage for all strata corporations should be reviewed to ensure that at a minimum, it complies with the Act. Now that additional insurance coverage is expressly permissible, the availability of different coverages should be reviewed with the strata council. Earthquake and municipal bylaw coverage certainly should be reviewed with strata councils.

Given the increased responsibility of strata council members, and the increased legalistic nature of the Act, strong consideration should be given to having all strata councils obtain errors and omissions coverage.

Unless the strata property agent is particularly qualified, they may want to have the strata council (or representatives of the strata council) meet directly with the insurance advisor. This results in better-informed strata councils, and may shift the liability directly to the insurance agent away from the

strata property agent, if there is insufficient insurance coverage for a certain event. The insurance agent should be the person preparing the annual report on the adequacy of the insurance.

Strata property agents generally should consider shifting to arrangements that do not make them the middleman, which creates exposure for liability for little or no reward. Strata property agents may even want to avoid recommending particular insurance agents but instead refer strata councils to a list of qualified agents and have the strata council make the decision on which agent to use.

Strata property agents should ensure that the strata corporations' insurance coverage includes insurance to cover the indemnity that the strata corporation gives to the strata property agent under the strata agency agreement.

XIII. SECTIONS

The Act now permits the following sections: (a) residential and non-residential sections; (b) sections with different types of non-residential lots where lots are used for significantly different purposes; and (c) different types of residential lots being apartments, townhouses and detached homes (reg. 11.1). Thus there can now be many separate sections within strata projects.

The owner developer may create sections at the time of filing the strata plan in the Land Title Office (sec. 192). Owners may do so at a meeting if they obtain a 3/4 vote of those in the existing and proposed sections, plus an overall 3/4 vote (sec. 193).

Separate sections can have their own operating funds, contingency reserve funds, budgets and special levies for the section, sue, arbitrate and contract in the name of the section, enforce bylaws and rules (sec. 194). Sections will have their own expenses (sec. 195), executives and meetings (sec. 196), bylaws and rules (sec. 197), and can sue and have judgments awarded against them (sec. 198).

A. Impact On Strata Property Agents

The Act now allows more types of sections and it is possible to have numerous sections within in a complex. Additional sections will result in increased administrative costs to the strata corporation and the strata property agent including such things as additional accounting costs and costs related to an increased number of meetings. This should be reflected in any fee arrangements provided in strata agency contracts.

The Act does not expressly permit different sections for units in different phases of a single project, between units constructed of different materials (concrete vs. wood frame), building height (high rise apartments vs. low rise apartments) etc. The implication is that if the sections are not based on the categories provided under the Act, they are not permitted, but that point is not entirely clear.

XV. REVISE STRATA PROPERTY AGENCY CONTRACTS

The Act significantly increases responsibilities on owner developers, strata corporations, strata councils and ultimately strata property agents. All strata property agents should review their strata agency agreements with their existing strata corporations and take this opportunity to draft new

standard agreements. They may wish to use the Association of Strata Property Agents of British Columbia's standard form contract.

The new strata agency contracts should incorporate the following points:

- (1) It should follow the agency model instead of the management model, which implies that you will manage the property on their behalf. Strata property agents should be acting at the direction of the strata corporation and the strata council.
- (2) The contracts should expressly deal with early termination provisions.
- (3) All obligations of the strata property agent to do things should be qualified such that they will only be required to follow the strata councils instructions, to the extent permitted by the Act and not prohibited by Strata Council/Corporation.
- (4) The contracts should provide that the strata property agents may get instructions from strata council or even just the strata council chair.
- (5) The contracts should establish the maximum number of meetings or the maximum number of hours that the strata property agent must attend for the set fee and provide for an hourly charge out rate after that.
- (6) The contract should exclude any liability of the strata property agent for the negligence of other professional advisors recommended by the strata property agent.
- (7) The contract should provide for the strata council to meet directly with the insurance agent and have them make the insurance coverage decision.
- (8) The exclusion of liability clauses should be reviewed and revised to limit or cap the maximum exposure of the strata property agent.
- (9) The contracts should include an indemnification clause that provides the strata corporation will indemnify the strata property agent for any losses or damages where the strata property agent acted properly and upon the instructions of the strata corporation.
- (10) The contract should restrict the access of owners to the strata corporation records to specified hours.

IX. LIABILITY OF STRATA PROPERTY AGENT

In this increasingly litigious world, the exposure of all professionals to liability seems to be constantly increasing and the strata property agency industry is not exempt from this trend. The courts are increasingly holding professionals and those who hold themselves out to be experts in their field, to be liable for their negligent acts or omissions. The standard of care required also seems to be constantly increasing. Like other professionals, strata property agents are facing increased liability to those that they contract with (ie. strata corporations) as well as other third parties (prospective purchasers, service people). To the extent that strata property agents carry our

their activities negligently, they are liable for those actions. They need to practice defensively as do other professionals. .

To the extent the *Strata Property Act* has increased the complexity of the establishment, operation and management of strata corporations, strata property agents must increase their own training and education standards to ensure that they can handle the responsibilities imposed. Strata property firms should ensure that their training and supervision of their individual agents is up to date and ongoing.

To the extent that strata property agents can limit their liability contractually, they should ensure that their contracts do so. To the extent that liability arises outside of the contract (tort liability) they should ensure that they have potential defences to any claims and insurance coverage should those defences not succeed. They should ensure that they are insured, that they know the terms of those policies and comply fully with the terms of the policies.

Strata property agents should take care when providing “opinions” to strata corporations. If the issues are complex or have significant potential liability, strata property agents should advise strata corporations to obtain legal advice. At a minimum, strata property agents should take time to reflect on advice sought. It is advisable that they ask that the questions be put in writing and that they provide the response in writing. If the strata corporation does not want to put the questions in writing, the question should be confirmed in the written response from the agent. Where appropriate, the response should be qualified or limited. Notes to file are also important and often very helpful in defending claims.

Where reasonable and possible, strata agents should consider giving strata councils a series of options and have the strata council make the decisions. For example, when replacing or upgrading their security systems they should seek bids from three different contractors and have the strata council make the decision. They should avoid giving a specific recommendation where reasonable and possible. Strata agents should try to position themselves so that they can, if true, show that the strata council did not rely on their advice but made the decision themselves.

When turning over records to a strata corporation, the strata property agent should ensure that they keep copies of anything that may assist them in some future defence to a negligence action. Often these contracts are terminated when there is some issue in dispute and the strata property agent should ensure that they keep copies of things that will assist them in their defence. They must turn over the material to the strata corporation as it belongs them, but there is no reason why they cannot retain copies.

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