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BC STRATA AND CONDOMINIUM LAW NEWSLETTER

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Legal Pitfalls

New Requirements for Rental Restriction Bylaws

Matthew Fischer

Many strata corporations have bylaws which restrict the number or percentage of residential strata lots which may be rented. **Section 141(3) of the Strata Property Act** requires that a rental restriction bylaw must set out the procedure to be followed by the strata corporation in administering the limit. Normally, the limit is handled on a first-come-first-serve basis, administered by a wait list.

In the August 5, 2016 decision (**Mathews v The Owners, Strata Plan VR 90, 2016 BCCA 1801**), the BC Court of Appeal has effectively overridden the 2014 Carnahan decision (**Carnahan v the Owners, Strata Plan LMS 522, 2014 BCSC 2375**) which was the leading case from the BC Supreme Court interpreting section 141(3) of the Act.

The Carnahan case had previously set out specific requirements for valid rental restriction bylaws; suggesting that rental bylaws must express the basis upon which the strata council will determine who is entitled to rent. The Judge in the Carnahan case expressed the view that owners and prospective strata lot purchasers should be able to determine from the bylaw whether or not they will be entitled to rent if they apply.

The Mathews decision from the BC Court of Appeal sets out different binding criteria which

every strata council must follow in administering any rental restriction bylaw. The main points of the decision are:

1. A valid rental restriction bylaw must set out the procedure to apply for permission to rent, but does not have to set out the process which will be followed by the strata council.
2. A rental restriction bylaw cannot screen which owners may rent their strata lot. Previously, it had been understood that the strata corporation was only banned from screening the tenants that would rent the strata lot.
3. The Court of Appeal also informally noted that using needs-based criteria or other similar models when determining the next owner to rent is likely an unlawful model as it would screen the owners which are entitled to rent. Therefore, the Court noted "by default, adoption of a wait list is, practically speaking, the only permissible way of administering the limit that is open to a strata corporation".

The Mathews decision is a bit puzzling as section 141(3) requires that the rental restriction bylaw set out the procedure to be followed by the strata corporation in administering the limit - not the procedure to be followed by the applicant when seeking permission to rent. Also, the bylaw which was at issue in the Mathews case contained multiple serious flaws which don't appear to have been raised before or considered by the Court, including some requirements which appear to directly contradict other provisions of the Act.

Most existing rental restriction bylaws will need to be reconsidered in light of the change in legal and procedural requirements. Strata councils will also need to consider how they are administering a rental restriction bylaw. Experienced legal advice and assistance is strongly recommended in reviewing rental restriction bylaws, which can be very contentious. Flawed rental bylaws can create costly disputes.

The Mathews decision does not affect rental prohibition bylaws or strata corporations that don't have any rental restrictions or prohibitions.

Repair of Code Deficiencies to Limited Common Property

Taeya C. Fitzpatrick

The strata corporation's duty for repair and maintenance of common property, even limited common property, includes an obligation to correct original construction deficiencies and building code compliance issues that exist from the initial construction. The extent to which a strata corporation bears that responsibility has been clear since the Court ordered a strata corporation to correct harmless water discolouration issues in the 2002 case of **Taychuk v The Owners, Strata Plan LMS 744, 2002 BCSC 1638**.

In the case of **Frank v The Owners Strata Plan LMS 355, 2016 BCSC 1206**, an owner purchased one of the penthouse units that had a limited common property rooftop deck which was designated as the rooftop deck when the strata plan was filed in 1992. In the history of the strata corporation, the rooftop decks were always used for recreational purposes.

Sometime in 2009 the owner, Frank, became aware that the railings for the rooftop deck did not comply with the BC Building Code for recreational use (they were too low). Frank received permission from the strata corporation to install new railings. After hiring an architect and engineer to design the new railings, Frank asked the strata corporation to pay for the cost of installing the new railings. The strata corporation refused on the basis that the installation of new railings was a significant change in the use or appearance of common property, was only for Frank's benefit, was an alteration of common property that Frank should have to pay for, and that the original intention of the rooftop deck was not for recreational use but for installation of air conditioning units. The strata corporation relied on the original building permit from the owner developer with respect to rooftop deck use rather than the strata plan which had been relied upon since 1992.

The Court agreed with Frank, stating that:

- The installation of new railings was not a significant change in the use or appearance of common property;
- The strata corporation's obligation to repair and maintain common property extended to the obligation to make the railing safe for rooftop deck use, as was defined in the strata plan;
- The owner developer's original intention of the limited common property designation of the rooftop did not matter, the owners were entitled to rely on the strata plan; and
- It was significantly unfair of the strata corporation to refuse to replace the railings and to prevent Frank from replacing the railings.

Strata corporations frequently end up in litigation over repair and maintenance obligations. The issues involved are very technical and can be very difficult to navigate. If repair obligations or a strata corporation's bylaws are contentious and/or unclear, or there is a dispute as to an owner's responsibility to repair or maintain common or limited common property, legal advice is strongly recommended.

Can't be Unfair to Exercise Vote

Taeya C. Fitzpatrick

In the case of **Chow v The Owners, Strata Plan NW 3243, 2015 BCSC 1944**, the strata corporation wanted to change the strata plan that was created by the Owner Developer 25

years ago by removing limited common property designations from the strata plan. To do so, the strata corporation required a unanimous vote from all owners in the strata corporation. When a group of owners refused to approve the unanimous vote, the strata corporation applied to Court to remove the need for their approval. Of the 37 strata lots in the strata plan, 27 voted in favour, 6 voted against, and 2 refused to vote.

As a result of nearly 16% (and more than one strata lot) opposing the unanimous vote, the strata corporation was unable to apply under **section 52 of the Strata Property Act**, to dispense with the need for 100% approval. Under section 52 of the Act, the strata corporation can apply to dispense with 100% approval if; only 1 strata lot dissents (where there are at least 10 strata lots) or the strata corporation has obtained 95% approval; the resolution is in the best interests of the strata corporation; and the resolution would not unfairly prejudice the dissenting voter(s).

The Court determined that it was fair for the owners to refuse to approve the unanimous vote and that the Legislature clearly intended for one owner to have the ability to prevent the strata plan from being amended in this sort of case. The strata corporation was not able to remove the Owner Developer's limited common property designations.

It is possible that the Court would have made a different determination and approved of the unanimous vote even where less than 100% of the owners voted in favour of the vote if there were different facts before the Court such as:

1. The missing votes were due to owners abstaining from voting or simply not responding to the vote;
2. The unanimous vote is required in order for the strata corporation to complete a significant duty or obligation of the strata corporation, which obligation or duty, if not fulfilled would create significant liability or expense for the strata corporation; and/or
3. The opposing votes are attempting to block the unanimous vote for improper reasons such as the oppression of another owner or owners.

Each case must be determined on its own merits and, quite often, different facts produce different results in Court. This case may be helpful or determinative to a Court deciding a section 52 application. If you are experiencing an issue with a strata corporation failing to meet its obligations due to voting issues, you should seek prompt legal advice.

Owner Developer and the Next Phase of a Strata Plan

Taeya C. Fitzpatrick

The case of **The Owners, Strata Plan LMS 1495 v 0753874 BC Ltd, 2015 BCSC 2124** deals with the interpretation of **section 220 of the Strata Property Act** and

determining who the owner developer is for subsequent phases in a phased strata plan.

The numbered company, 753874 BC Ltd, purchased the remainder lot for phase 4 of the strata plan from the original owner developer. 753 then argued that it was not the owner developer and did not undertake any owner developer obligations.

The Court ultimately determined that when 753 purchased the remainder lot for phase 4, 753 became an owner developer for the purposes of section 13 of the Strata Property Act and was therefore liable to contribute to the common facility expenses in section 227 of the Act.

Problem Owners

Taeya C. Fitzpatrick

The strata corporation in **The Owners, Strata Plan NW 1245 v Linden, 2016 BCSC 619**, sought injunctions against owners to stop abusive behaviour, breaching of the bylaws, and sought to evict the owners from their strata lot. The owners in question were accused of; causing excessive noise by yelling, screaming, singing, playing loud music, slamming doors, and permitting their dogs to bark in their unit and the common areas for extended periods; engaging in abusive conduct; and causing damage to common property. Several incidents required the police to attend the strata plan to de-escalate the conduct. Further, the owners had informed the strata council that the owners intended to install an air conditioning unit on common property without approval of the council.

The extensive affidavit evidence of the owners' conduct easily permitted the Court to grant the injunction to prevent such behaviour in the future. The Court also ordered the owners not to install the AC unit onto common property without council permission.

Another issue in this case was the collection of fines that the strata corporation was seeking from the owners. Council had been levying fines in the amount of $200 per breach but only had authority to issue $100 per breach based upon the bylaws. In spite of the irregularity, the Court permitted the strata corporation to collect the reduced amount of fines because there was no basis to reduce the fines further or cancel the fines.

The Court refused to grant an order evicting the owners from their strata lot before the owners breached the injunction. There was no evidence before the Court that the injunction preventing the behaviour would not be successful. Therefore, no eviction order was granted at that time.

Fischer & Company

Fischer & Company, located in the heart of the Okanagan, Kelowna, has provided a wide range of legal services to individuals, strata corporations and management companies in Kelowna, the Okanagan, and throughout the entire Province of British Columbia, since 2007. Fischer and Company is comprised of two lawyers, Matthew Fischer and Taeya Fitzpatrick, and a dedicated support team.

For more information on our Services Offered, to review our online Strata Basic Tips or New updates, or to see how we can assist you with your issue, please visit our website at **www.fischerandcompany.ca**

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