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BC STRATA AND CONDOMINIUM LAW NEWSLETTER

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Vacation 'Rentals' - Strata Property Regulation Amendment

The Regulations to the Strata Property Act have been amended again; this time to allow hefty fines for contravention of a strata bylaw which prohibits or restricts strata lot use for vacation, travel or temporary accommodation.

The Strata Property Act did not adequately deal with short term accommodation arrangements and has long remained unclear with respect to whether such a "license of occupation" should be considered a rental for the purposes of a rental bylaw or for other purposes; such as the requirement for a Form K (notice of tenant's responsibilities), or rights pursuant to a rental disclosure statement.

The Provincial Government has just responded to concerns arising from proliferation of vacation accommodation programs, websites and apps by allowing strata corporations to increase fines, without clarifying the underlying issues. It appears that their main concern was to address availability of affordable residential rental units.

Astoundingly, the new fine amount is up to a maximum of $1000 per day of contravention. This will be an effective deterrent against short term accommodation use for participating strata corporations.

Every strata council will still need to be fair in assessing such fines - and must not automatically assess the maximum fine without regard to the circumstances.

Before assessing the new, heftier fines, a strata corporation must properly approve and register a well drafted bylaw which correctly restricts or prohibits such use, and where the bylaw specifically authorizes the increased fine amount.

The regulation is deferred until November 30, 2018 - so planning for implementation is a good idea, but these new fines cannot take effect before then - even if there is a bylaw in place before that date.

Another important point is that the fine only applies to bylaws which govern such use for "remuneration", but not for non-pecuniary benefits or "valuable consideration"; which suggests that non paying guests and house swaps (and other such uses from which the owners derive no currency remuneration) cannot be the subject of such a fine - but can still be restricted by the Strata Corporation with a standard (lower) fine maximum of $200 per incident, or per 7 days for continuing contraventions. Proving remuneration was received by the owner is an essential element required for assessment of the enhanced fine amount and that may be difficult in many cases, even on a balance of probabilities.

In my opinion there are some issues which should have prompted better industry consultation by the Provincial Government.

For example, there is the question of whether any of the Strata Property Act provisions related to rentals apply (or should be amended to apply) to short term accommodation arrangements. If not, then bylaws which restrict vacation, travel or temporary accommodation can come into force immediately (after November 30th) for all owners once the bylaw is approved and registered; regardless of existing bookings or accommodations and regardless of whether there is a rental disclosure statement. In my view there is a need to delay implementation of a newly approved short term accommodation bylaw; to avoid forcing owners to cancel bookings at their own legal jeopardy.

Some of these fundamental issues are currently before the B.C. Court of Appeal, and it appears that rather than waiting for the decision of the B.C. Court of Appeal, the Provincial Government has decided that the result is a foregone conclusion, and implemented this change. The Court in *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478* had concluded that “there is nothing in the legislation suggesting that occupancy of units arising outside of a tenancy agreement are protected in any way”, and that section 143 of the Act is not applicable to licenses. That decision has been appealed, and the decision appears to be pending.

Legalization of Marijuana for Recreational Use

On October 17, 2018 marijuana consumption and cultivation of up to four marijuana plants per household will be legal in Canada. Federal legislation will allow cultivation even outside on land which is "appurtenant" to a strata lot. Proposed Provincial legislation will restrict, but not prohibit such cultivation.

Both the Federal and Provincial governments have committed to allowing strata corporations to create their own restrictions to prohibit cultivation, and current case law confirms that strata corporations can prohibit or restrict smoking or vaping where it is likely to cause a disturbance - even within an owner's strata lot.

Every strata corporation should consider whether they need to update their bylaws to address smoking and cultivation. Please feel free to contact us if you would like to see sample wording, or enlist our help in enacting appropriate bylaws.

Can You Have Retroactive Strata Fee Increases? What Happens When Strata Fees Go Up?

The Annual General Meeting is when the owners approve the budget which determines cash flow and strata fee payments for the fiscal year. The problem is that by the time that the budget is approved, up to two months of the fiscal year will have passed. When does the strata fee increase begin - and how is it collected?

The Strata Property Act doesn't deal with this well, providing no meaningful guidance as to how to collect a strata fee increase or adjust for a strata fee reduction. The Act requires that the budget apply to a single fiscal year. Further, the strata corporation will need the increased cash flow to meet those expenses which have been budgeted for that fiscal year. Even the standard bylaws refer to payment of strata fees being payable for the month to which they relate, but provide no further guidance.

There are four main ways of handling this:
1) Simply raising strata fees for the next twelve months, which doesn't address the issue of capturing the strata fees during the fiscal year to which they relate and for which the increased cash flow is needed.
2) Raising the strata fees for the 10 months remaining in the fiscal year - which creates various problems for calculating the continuation of strata fees into the following fiscal year.
3) Requiring a catch-up payment (or credit) following the Annual General Meeting, if the strata fees change - which has the potential to create problems if a strata lot was sold in the first two months of the fiscal year, particularly if a Form B and Form F certified that

strata fees were paid in full, and the catch-up payment is characterized as being a strata fee increase for those two months.
4) Holding the AGM just before the fiscal year begins - in which case other issues arise, such as the difficulty in preparing the necessary financial statements.

There isn't any clear legal support or guidance with respect to any of these options, and it isn't at all clear how the Strata Council is supposed to derive authority to implement any of these or any other approach without a bylaw. It is my view that every strata corporation should have a bylaw which dictates how this common situation is to be handled.

There was a recent CRT decision on this topic which suggests that retroactive strata fee increases (as contemplated above in option 3) are not permissible. However it is important to note that CRT decisions are not binding precedent. In addition it is my opinion, that decision contains at least one significant internal contradiction, was prepared without fully considering all of the issues, and was issued by a tribunal member who has not been trained as a lawyer or practiced law - all of which make it less likely that it would be followed by a Court of competent jurisdiction capable of providing guidance to the province as a whole.

In that decision (*The Owners Strata Plan NW 2729 v. Haddow et al* (2018 BCCRT 37)), the adjudicator found that there is no legal authority to charge retroactive strata fee increases, that doing so couldn't have been intended by the drafters of the Act, and that doing so creates problems relating to Forms B and F which have been issued prior to the Annual General Meeting. Those comments are fair, however the conclusion drawn from those circumstances are too broad, and there follows some contradictory language with respect to what constitutes a retroactive strata fee increase. The case acknowledges that there is a gap in the legislation, but provides no meaningful guidance as to how to correct the issue.

There is an important note in the decision:

“Nothing in this decision restricts the strata from setting out in its bylaws how it will collect strata fees to meet its budgeted expenses provided such bylaws are not contrary to the SPA, do not require retroactive strata fee payments, and are calculated in accordance with section 99 of the SPA”

Our practice in recent years has been to recommend bylaws which contemplate a catch-up adjustment, but make it clear that the catch-up payment isn't due until after notice of the strata fee increase has been communicated to all owners pursuant to section 106 of the Strata Property Act. To avoid controversy, we've amended our templates since the Haddow decision to provide additional clarity that the increase is not 'retroactive', doesn't specifically relate to a date which has passed, and that it is payable by the current owner at

the time that the adjustment becomes payable following the section 106 notice of a strata fee increase and adjustment amount. Of course, we've also prepared bylaws which contemplate other options - and we can work with a strata council to address this issue in a way that best accords with the legal requirements, the strata corporation's historical practices and the practical necessities.
