

THE ANATOMY OF A HEARING

by Cora D. Wilson, J.D.

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A written request by an owner to the strata corporation for a hearing can be an effective tool to address grievances. Holding a hearing can resolve issues that may otherwise result in legal proceedings.

Both councils and owners often have questions regarding these hearings. This article is a non-exhaustive review of many of these questions. For instance, how should the council conduct the hearing from a procedural and substantive perspective? What subject matters may be addressed during a hearing? Who can be present at the hearing? Are there any limitations on the hearing process? When is a decision required? What are the mechanics of making a decision?

What is the procedure for holding a hearing?

Section 34.1 of the *Strata Property Act* (the “Act”) addresses hearings, as follows:

- 34.1(1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.
- (2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.
- (3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing.

The requirement to hold a hearing is mandatory. The hearing process has an important purpose, in that it creates a due process forum for owners and tenants. However, it should not be abused or used for an improper purpose.

There are procedural and substantive differences between a hearing held pursuant to 34.1 of the Act and a hearing held to address alleged bylaw or rule contraventions pursuant to section 135 of the Act. Legal advice should be sought from a qualified strata lawyer if there is any doubt regarding how to address these provisions.

There are no statutory limitations on the subject matter which may be addressed during a hearing or how often a hearing on the same subject matter may be held. This leaves the door open for potential abuses, such as multiple requests for a hearing to address the same subject matter or to address issues which cannot properly be addressed as part of a hearing. For example, the hearing process should not be used to address matters cloaked by legal privilege or to circumvent privacy. Owners and tenants should be alive to the fact that the council is generally made up of volunteer owners.

There are limitations on who can apply for a hearing. Only an owner or tenant can request a hearing. Occupants, who are neither an owner nor a tenant, are not included in the class of applicants. Therefore, if a non-owning spouse makes an application, the council is not under a legal obligation to hold a hearing and provide a decision.

If a written application is received by the strata corporation, then who must hold the hearing? Regulation 4.01 of the *Strata Property Regulations* states that “hearing” means “an opportunity to be heard in person in a council meeting”.

The simple statutory provision regarding hearings raises numerous complex questions.

What is the procedure for calling and holding a hearing?

Since hearings must be held at a council meeting, it is important to consider what the correct procedure is to call one. The procedure for calling a duly convened council meeting can be summarized as follows:

1. Regulation 4.01 requires that the application be addressed at a “council meeting”. Therefore, this business should be placed on the Agenda for the council meeting.

2. The bylaws should be reviewed to determine the requirements for calling and holding a council meeting.
3. The statutory Schedule of Standard Bylaws provide that any council member may call a council meeting by giving the other members at least one week's notice specifying the reason for the meeting.
4. When calculating the number of days required to call a council meeting, the day the notice is given and the last day of the notice period are added to the count. As a result, the council meeting must be held 9 days or later after notice is given.
5. The hearing at a duly convened council meeting must take place within 4 weeks from the date of delivery of the application or the deemed date of delivery.
6. A notice given to the strata corporation by an owner or tenant is conclusively deemed to have been given when it is left with a council member or 4 days after it is mailed, faxed, emailed or put through the mail slot or in the mail box (s. 63(2), Act).
7. Therefore, the council meeting must be held within 4 weeks after the delivery of the request. When calculating the number of days *within* the four week period (28 days), the day the application is received or deemed to have been received is not counted as one of those days. The hearing cannot take place on the last day of the 4 week period (the 28th day) since this date would be out of time. Therefore, the hearing must take place prior to the 28th day after the date that the notice is delivered or deemed to be delivered.
8. For instance, if the notice was delivered personally on September 30th, then the meeting must be held on any date prior to October 28 - it cannot be held on or after October 29. If the notice was delivered by any other method, such as fax or email, then 4 days must be added to the notice period.
9. The calculation of notice periods can be complex. A person with an issue regarding delivery dates or deemed delivery dates should obtain legal advice.
10. In order for a council meeting to be duly convened, the quorum requirements must be met and the council members must meet the eligibility requirements to sit on council and not be subject to early removal during the term. The bylaws should be carefully reviewed to determine quorum and the requirements for a council member to serve or to continue to serve on council.

How should a council member address conflicts?

A council member should refrain from acting as a council member if his or her personal interests conflict directly or indirectly with those of the strata corporation (see s. 32, Act). It is the member's duty to disclose and otherwise address such conflicts. This is a complex issue and if a council member is concerned that he or she may have a conflict, then he or she should seek independent legal advice.

How should the council members conduct themselves during a hearing?

The purpose of a hearing is to hear from the applicant. Council members may ask questions. However, a hearing is not a forum for a debate. The council should act in a quasi-judicial manner during the hearing. In other words, council members should act in an objective, impartial and unbiased manner.

The hearing provides an owner or tenant with an opportunity to be heard at a council meeting and to provide information that council can consider when making a decision. There is no obligation on the council to respond to questions and the hearing is not intended to be a forum for an owner or tenant to grill the council, engage in abusive conduct or to otherwise use the hearing for another improper purpose.

Who can attend a hearing?

Schedule of Standard Bylaw 17(3) indicates that owners may attend council meetings as observers. There is no reference to tenants attending council meetings. This provision does not grant an owner the right to participate in discussions or the decision-making process at a strata council meeting if he or she attends as an observer. Caution should be exercised regarding allowing an owner to observe a hearing. Generally privacy considerations would require there to be no owners attending a hearing as observers.

Can an owner or tenant bring other people with them to the hearing including witnesses, agents, lawyers or other persons to assist them with the hearing? Subject to the bylaws or a decision by the council to the contrary, this may be a reasonable course of action and support people should not be unreasonably restricted or limited by the council. The council is at liberty to refuse to allow support people if the attendance is contrary to the Act or the bylaws, if there is an objection, a privacy concern, a safety concern, a violation of litigation privilege or if the attendance is viewed as an abuse of process or for an improper purpose.

The procedure regarding observer involvement at a hearing is subject to the Act, the bylaws, privacy concerns, litigation privilege and other due process consideration. These bylaws should be carefully reviewed to determine the extent to which observers may be present during a council meeting. Some bylaws prohibit observers. Other bylaws require observers to leave a council meeting in certain circumstances, such as when there are privacy concerns or where the council wishes to go in camera. The bylaws will govern the conduct of the owners, tenants and council members and as such, they should be carefully reviewed.

Can the council place time limitations on a hearing?

The council may place a limit on the period of time available for an owner or tenant to state their case during the hearing. This time period should be reasonable given the subject matter of the hearing. What is reasonable depends on the complexity of what is being discussed.

What is the scope of council's discretion when making a decision?

The strata corporation cannot interfere with the council's discretion regarding certain matters, including whether a person has contravened a bylaw or rule, whether a person should be fined and the amount of the fine, whether a person should be denied access to a recreational facility and whether a person should be required to pay the reasonable costs of remedying a contravention of the bylaws or rules and whether an owner should be exempted under a bylaw that prohibits or limits rentals (s. 27(2), Act).

Council decisions can be challenged on certain grounds such as, for example, if they are significantly unfair, contrary to law or otherwise improper.

What is the procedure for decisions?

The council must give the applicant a written decision *within* one week after the hearing if a decision is required. When calculating the number of days within the one week period (7 days), the day the hearing is held is not counted as one of those days and the decision must be delivered to the applicant before the 8th day.

A decision given to the applicant by the strata corporation is given when it is left with the applicant or is conclusively deemed to have been given 4 days after it is left with an adult occupant, put under the door, mailed, put through the mail slot or in the mail box, faxed or emailed (s. 61, Act).

There are concerns regarding whether delivery of a strata corporation decision to an owner or tenant by email is valid if the owner or tenant did not specifically provide the email address for that purpose: *Azura Management (Kelowna) Corp. v. Strata Plan KAS2428* (2009), 95 B.C.L.R. (4th) 358 (B.C.S.C.). The strata corporation should not deliver a decision to an owner or tenant by email unless it has first obtained the written consent from the owner or tenant to provide delivery by email for purposes set out in s. 61 of the Act.

Conclusion:

The hearing can be a useful and powerful tool for owners and tenants to air certain matters and address disputes. It can also be a powerful tool to show a court that the council followed proper procedure in allowing the owner to state his or her case and that it made its' decision based on proper information. I envision that the hearing process will be used more and more frequently in the future.