

MAJOR LEGISLATIVE CHANGES IMPACTING REPAIRS & BEST PRACTICES

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Recent amendments to the Strata Property Act (“Act”) will make it easier for a strata corporation to repair and maintain their buildings. The first legislative amendment changes the voting threshold at a general meeting of owners from a $\frac{3}{4}$ vote to a majority vote when funding a depreciation report or approving repairs recommended by a depreciation report from the contingency reserve fund (the CRF).

The second legislative amendment permits a strata corporation to proceed with a court application to obtain an order for repairs in the situation where a $\frac{3}{4}$ vote resolution for a special levy fails but more than 50% of the votes cast were in favour of the resolution. It is important to remember the strata corporation must approve the funding to proceed with court action. It is recommended that the strata corporation obtain advice from a qualified strata lawyer to verify that this amendment applies to the strata corporation in question.

Recent reviews of resolutions approved by strata corporations reveal major flaws which could result in resolutions being struck down if challenged. The consequences could be catastrophic since the resolution forms the foundation for funding repairs, paying contractors, financing the repairs and collecting arrears. If the resolution falls, then the owners’ legal obligation to pay also falls. The process could become a house of cards.

The following discussion reviews the new legislation in a summary fashion, addresses some of the pitfalls and outlines the process for a strata corporation to follow as a best practice.

Summary of Legislative Amendments

As of April 9, 2014, section 92 of the Strata Property Act (the “Act”) was amended to clarify that the cost of a depreciation report can be an operating expense. This means the cost to obtain a depreciation report may be included in the annual budget, which is approved by a majority vote.

Also effective April 9, 2014, the cost to obtain a depreciation report can be paid out of the CRF by a majority vote (s. 96(b)(i)(A)(I), Act).

This creates an exception to the general rule that a $\frac{3}{4}$ vote resolution is required to approve expenditures from the CRF. Owners are now permitted to approve funding for repairs, maintenance or replacement recommended in the most recent depreciation report by a majority vote (s. 96(b)(i)(A)(II), Act).

By way of summary, a strata corporation can now use a majority vote to fund both a depreciation report and the work recommended in the depreciation report from the CRF.

It is anticipated that these changes will result in more strata corporations proceeding with depreciation reports and addressing major repair programs in a planned, reasonable and timely fashion to meet the mandatory statutory duty to repair imposed by the Act.

The team approach comprising appropriate qualified certifying professionals, qualified contractors, a strata lawyer, a strata manager and other qualified persons is recommended to ensure that the strata corporation meets the minimum standards. They safe guard the process by ensuring that the strata corporation acts within the scope of its statutory authority, both substantively and procedurally, adheres to due process, provides transparency and complies with the mandate provided by the approved resolutions.

Special levy resolutions still require a $\frac{3}{4}$ vote of owners at a general meeting (s. 108, Act). Effective December 12, 2013, the strata corporation may apply to the Supreme Court for an order approving a special levy to address maintenance or repairs defeated by the owners at a general meeting provided that more than $\frac{1}{2}$ of the votes cast favoured the resolution (ss. 173(2) & (4), Act). Previously, a $\frac{3}{4}$ vote was required to authorize the strata corporation to engage in such litigation. Although it is now easier to proceed to the Supreme Court, many obstacles still remain. This process tends to be political, cumbersome, expensive and uncertain.

Since the funding for such litigation still requires a $\frac{3}{4}$ vote, I recommend that sufficient monies for legal costs be approved as part of the annual budget. This will allow the council to conduct business, while minimizing the probability of time consuming and often difficult political battles to obtain expenditure approval.

The legislation encourages the use of the CRF as a long term planning tool. Special levies will likely be used less often given the higher voting threshold required for approval. Clearly it is easier to obtain a majority vote approving monies already available in the CRF than it is to approve a special levy ($\frac{3}{4}$ vote). It is envisioned that more strata corporations will investigate financing options available to them to minimize the burden of a huge repair levy. Both special levies and strata corporation financing (borrowing) require a $\frac{3}{4}$ vote for approval (ss. 108 & 111, Act). If the CRF is exhausted or insufficient, owners may view financing (borrowing) as a palatable option in appropriate cases. For example, a repair levy of \$50,000.00 per strata lot amortized over 15 years costs about \$394.00 per month assuming a 5% interest rate (prime plus 2%). It is easier for some owners to pay \$394.00 per month as opposed to coming up with \$50,000.00 all at once.

One of the objectives should be to ensure that owners do not lose their home if they cannot afford to pay the special levy. When the strata corporation acts as the borrower it gives everyone a fighting chance by minimizing the owner subsidy if some owners default, ensuring that funding is available to pay the contractor when due and providing those owners who are least able to pay with an opportunity to hold onto their investment.

The Train Wreck Resolution:

It is not unusual to find a poorly worded resolution such as the following:

Resolved: Contingency reserve fund expenditure by majority vote not to exceed \$3,000,000.00 to replace up to 30 roofs with cedar shakes in 2014, 30 roofs in 2015 and the remaining roofs in 2016. Approved.

The major problems with this poorly worded resolution include the following:

- (a) the strata corporation only has \$500,000.00 in the CRF;
- (b) the depreciation report did not require all of the roofs to be replaced over a 3 year period; and,
- (c) a $\frac{3}{4}$ vote is required to approve significant changes in the use or appearance of common property (s. 71, Act).

The failure to comply with substantive provisions of the Act is fatal. If a portion of the resolution cannot legally be approved by majority vote, then the whole of the resolution is in jeopardy of being struck down in the event of a challenge. The Courts do not have the power to save fatal resolutions - hence, approving a defective resolution in this case is akin to approving expenditures out of a bank account containing insufficient funds. The contractor will rely on this resolution as evidence that there are sufficient funds available to pay its accounts as they fall due. In fact, the funding is grossly inadequate.

There are other problems with this resolution. For example, the scope of authorized work is vague and uncertain and the phasing order of the work is not addressed.

The question is whether a strata corporation should act upon an approved resolution which fails to meet minimum legal standards. The council should seek legal advice from a qualified strata lawyer. As a matter of practice, the political process should always be exhausted before commencing legal proceedings. It could be that the resolution may be revised and ratified by a further vote of owners at a general meeting. This course of action is always recommended over proceeding with major repairs that rely on a flawed resolution.

The strata corporation should not proceed with the project for the following reasons:

- (a) There are insufficient monies in the CRF (short by \$2,500,000.00) to pay for the roofing project which requires an estimated amount of \$3,000,000.00 to complete.
- (b) Awarding the contract or a tender to a contractor for the complete scope of work (\$3,000,000.00) could place the strata corporation in a potential breach of contract situation if funding is not available as the project proceeds.

(c) Approval of the CRF resolution is predicated upon the approval of a further special levy resolution to provide the balance of the funding required to pay for the entire project. Since this has not occurred and there is no guarantee that it will occur, then moving forward creates the potential for unquantifiable, but avoidable, legal exposure to liability.

(d) The wording of resolution is vague and confusing creating uncertainty such that the resolution could be struck down on this basis.

(e) The failure to obtain a $\frac{3}{4}$ vote pursuant to section 71 of the Act, if required, is fatal to the validity of the resolution.

The strata manager's professional liability insurance does not cover work performed outside of that manager's scope of expertise. For example, resolution drafting is not only an art, it likely qualifies as the provision of a legal service. Strata managers are neither qualified nor licenced to provide legal services. Further, such services by a strata manager are not covered by their errors and omissions insurance. In the event of a loss to the strata corporation due to the negligent drafting of the resolution by the agent, there would be no recourse against the agent's insurance.

It is envisioned that brokerages in the future will exercise prudence and caution when addressing services which qualify as legal services and ensure that services are only provided within the scope of their expertise and licencing requirements and are covered by appropriate insurance.

Practice Tips

The process for addressing major repairs and approving the related expenditures is summarized as follows (this list is not exhaustive):

1. investigate the background of the professionals and contractors;
2. hire a qualified engineer, building envelope or other professional to assist with the process, as required;
3. ensure that appropriate professional insurance coverage is available;
4. retain an experienced strata lawyer;
5. obtain an estimate of probable costs for the repairs from a qualified certifying professional or obtain a reasonable number of quotes from qualified contractors for smaller projects;
6. determine whether the proposed repair is recommended in the most current depreciation report,
 - a. if yes, those repairs may be approved out of the CRF by majority vote subject to the availability of funds;
 - b. if no, a $\frac{3}{4}$ vote resolution is required to approve:
 - i. a special levy;
 - ii. expenditures out of the CRF for repairs which are not recommended in the depreciation report; or,
 - iii. strata corporation financing (borrowing);
7. consider preparing two resolutions for owner approval if there is a concern that the $\frac{3}{4}$ vote may not be approved to permit a partial repair;
8. address the options for funding the project:
 - a. strata corporation financing (borrowing);
 - b. special levy;
 - c. contingency reserve fund; or,
 - d. combination;
9. keep the owners informed regarding the project throughout including:
 - a. information meetings with the professionals, including the strata lawyer, as required;
 - b. newsletters;
 - c. web-site; and/or,
 - d. other means;
10. address any political, legal or construction obstacles or concerns in a reasonable and in a timely fashion;
11. instruct a qualified strata lawyer to prepare the resolution(s) addressing the following:
 - a. ensure that the repair authorization is tailor made to address all required work including, but not limited to, the scope of work set out in the professional's report and any additional work recommended by qualified professionals during the course of the work;
 - b. ensure that the expenditure authorization is broad enough to capture all expenses such as, the remedial work, warranty, landscaping, permit costs, professional costs, legal costs, collection costs, change work orders, etc.;

- c. include a reasonable contingency to minimize the possibility of an additional $\frac{3}{4}$ vote of owners to approve additional funding;
- d. authorize the council to approve change work orders;
- e. delegate decision making authority, including the power to make expenditures, to the council;
- f. approve significant changes to the use or appearance of common property by $\frac{3}{4}$ vote;
- g. insert a provision requiring the strata corporation to report to the owners upon completion of the work (eg. 6 months after completion of the work);
- h. if the funding amount is paid by a combination of special levy and the CRF, indicate where the expenditures will be applied from first and how any excess funds will be addressed; and,
- i. address any other clauses that may be required given the nature of the project; and,
- j. if a special levy is proposed, then the following must be addressed (s. 108, Act):
 - i. state the purpose of the levy;
 - ii. state the total amount of the repair special levy;
 - iii. state the method used to determine each strata lot's share of the special levy (e.g. unit entitlement);
 - iv. attach a schedule indicating the amount payable by each strata lot on account of the special levy;
 - v. state the date by which the special levy is to be paid, or, if payable in installments, the dates by which the installments are to be paid; and,
 - vi. draft an interest provision in the event of any default in payment of the special levy, including the commencement date (7 days after approval at a minimum).

The implementation of the major repair project is beyond the scope of this article.

Strata corporations are advised to seek legal advice from a qualified strata lawyer when addressing repair projects to provide input and advice throughout the process. This includes drafting the resolution.