

THE USE OF MEDIATION TO RESOLVE NUISANCE DISPUTES IN STRATA COMPLEXES

By Elaine McCormack, J.D.

Published in the Fall 2012 edition of the Voice from the Strata-sphere

As a council member or a strata manager are you asked to solve disputes between neighbours? Some of these disputes are legally termed “nuisances”, which makes them sound like they are minor annoyances, when they actually can seriously impact an individual’s enjoyment of his or her home. If you are a council member or strata manager being asked to solve a nuisance issue, you may decide to recommend mediation to the parties involved.

The term “nuisance” used in the legal sense means the unreasonable interference of someone else’s use of land. In a strata complex, this takes many forms. Here are some examples:

- An owner enjoys smoking a cigar on her patio, and the smoke from the cigar wafts up into a unit located on the second floor. The person living in the second floor unit has health concerns that are exacerbated by smoke and complains to council, demanding that all smoking on patios be prohibited.
- An owner’s late night hobby of playing a Fender Stratocaster guitar results in the person in the unit below being unable to fall sleep at night and unable to wake up for her early morning nursing shift and she demands that the neighbour sell his guitar.

The variety of possible nuisance scenarios in strata complexes is endless. Councils are often asked to enforce the nuisance bylaws, which generally read:

Use of property

3 (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that

(a) causes a nuisance or hazard to another person,

(b) causes unreasonable noise,

(c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

(d) is illegal, or

(e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

Although councils have a legal obligation to reasonably enforce bylaws, council members are often reluctant to do so in nuisance matters. One concern is that the council must have proof that a resident is causing the nuisance and each of the residents may have very different stories about what is actually occurring. In order to prove his or her case, the claimant may call council members at all hours of the day and night to investigate the matter. Also, many council members may realize that it will take more than following the bylaw enforcement procedure set out in section 135 of the *Strata Property Act* and rendering a fine on an owner or tenant to change his or her behaviour.

There are many different venues that can be used to resolve nuisance disputes. Resolution of strata nuisance disputes is commonly sought in the Supreme Court of British Columbia and at the BC Human Rights Tribunal and by way of arbitration under the *Strata Property Act*.

All of these venues involve an adversarial system whereby the parties, or lawyers on their behalf, provide an unbiased adjudicator or panel of adjudicators with the facts of the dispute and with their understanding of the law and the adjudicator(s) is asked to impose a binding decision on the parties. Even though the dispute can start solely between the neighbours, the strata corporation may be named in the proceeding for various reasons, including for the alleged failure to reasonably enforce its bylaws.

There are some risks involved in the process of using a judge, tribunal or arbitrator(s) to decide nuisance disputes in strata complexes. One of the risks is that by going through the dispute process, the relationships between the individuals involved may deteriorate further and it may become even more difficult for them to work together effectively. Another difficulty is that for some strata disputes, such as an owner complaining about smoke wafting into her unit from a patio below through an open window, it is generally difficult and expensive to prove what has happened in Court and the effectiveness of a Court Order in changing whether individuals are being considerate and reasonable towards one another is limited.

Given that Small Claims Court does not have the jurisdiction to grant injunctive relief (in other words, order someone to stop doing something like smoking cigars on their patio), the strata corporation can only seek relief in the Supreme Court of British Columbia for an order that the smoking resident comply with the bylaws of the strata corporation, or consider what relief may be available through arbitration. The court action as well as the associated expenditure on legal fees must be approved by a $\frac{3}{4}$ vote resolution of all owners. Many of the owners may be hesitant in this economic climate to commit to spending what can easily be legal fees in the five figures to resolve these disputes.

One option that a council can consider is for the strata corporation to suggest to the individuals involved that they participate in a voluntary mediation. Mediation is a process whereby a mediator, who is a trained and unbiased third party, assists the parties in communicating in a manner that clearly explains to the other party what is important to them, as opposed to just communicating their demands to the other party. By doing this, the parties may come up with a creative solution to the problem. In some circumstances only the feuding neighbours participate in the mediation, while in others council members participate as well. For instance, maybe the lady that enjoys smoking cigars on her patio can do so on Sunday afternoons when her neighbour is out visiting her daughter. The person who could do without hearing "Stairway to Heaven" one more time might be able to sleep better if the guitarist is allowed by the council to use the common meeting room located in the basement of the complex as a studio from time to time. Mediations often result in the parties signing a written agreement setting out the terms that all parties are willing to live by.

Mediators generally charge by the hour and often book sessions that last from approximately two hours to a day or two. Generally, each party shares half the cost. If council has the financial flexibility to do so, it may be good value for the strata corporation to cover the cost of the mediation, in order to get the disputing neighbours to the table and avoid a more costly way of addressing the conflict.

If you or your strata corporation are interested in using mediation to resolve a dispute, and are wondering if it is appropriate in the circumstances, please contact a lawyer familiar with mediation. Mediation is not appropriate in all circumstances, particularly if there is physical or verbal intimidation being used by a party towards another party. Also, pursuant to the *Personal Information Protection Act*, the council needs to seek the permission of the person making the complaint before revealing his or her identity and other personal information to the person complained of.

There is a wealth of information regarding mediation on the web, and there are several organizations that provide information and lists of potential mediators.