

## “HARDSHIP” - WHAT DOES IT REALLY MEAN?

By Cora D. Wilson, J.D.

*Published in the Spring 2002 edition of the Voice from the Strata-sphere*

The question is frequently posed, “When should a strata corporation grant the owner the right to rent a strata lot on grounds of hardship? A battle typically rages between the strata council which desires to exclude rentals and the owner who believes that he or she is suffering in some way and should have the right to rent. The strata council refusing to permit an owner to rent on grounds of hardship may face an application in the Supreme Court for an order granting the exemption in any event.

By way of background, an owner may apply to the strata corporation for an exemption from a rental bylaw on the grounds of hardship pursuant to Section 144 of the *Strata Property Act* (“SPA”). The owner must apply, in writing, and state the reason why he or she thinks the exemption should be granted and whether or not the owner requires a hearing. This provision appears to require a subjective test of hardship (ie. What does the owner think?) as opposed to an objective test (ie. What would a third party reasonable person think?). Clear cut direction on what documents a strata council may require to support the application is glaringly absent.

Section 144(6) of SPA provides that the strata corporation must not unreasonably refuse to grant the hardship exemption. So what does this mean?

Strata Council’s frequently ask the question, “Can we ask an owner to provide us with evidence of financial hardship ie. financial statements and other documents to support the allegations. Many believe that an owner’s financial documents are personal and extremely sensitive. A recent case appears to point towards a solution.

In *Als v. Strata Corp.* NW1067 [2002] B.C.J. No. 145, 2002 BCSC 134, Vancouver Registry No. L013649 (B.C.S.C.), J. Burnyeat addressed the issue of hardship. The owner argued that the grounds to establish hardship were as follows:

- the assessed value of the strata lot was lower than the amount of the mortgage by approximately 33%
- the owner’s employer transferred him to another city so accommodation costs were duplicated
- the owner would suffer a substantial loss if he sold at this time
- the insurance of the strata lot may be at risk due to prolonged vacancy

The strata council refused the request on grounds that there was insufficient evidence to establish that the inability to rent the strata lot was a financial hardship. The court agreed.

There was no mention of financial loss or figures given to suggest or prove hardship would be suffered as a result of the move. The strata lot owner refused to provide a financial statement on grounds that it was “very intrusive”. The financial information provided indicated that the strata lot owner received an incentive ie. his base rent was paid by the employer.

It is worthy of note that legal counsel requested evidence of other hardship applications from the strata council. The strata council refused this request on grounds of confidentiality. This is a common occurrence. The Court did not disagree.

If the strata council is not required to disclose confidential information of owners to other owners, then this gives the owner producing this information some comfort. However, the question of whether or not this information is compellable by another owner still remains unanswered. A specific ruling is required from the Court before one may conclude that confidentiality applies.

The following principles emerged out of J. Burnyeat’s review of the case law:

- the fact that the present sale value of a strata lot exceeded the purchase price of the strata lot was “not relevant”
- unsuccessful efforts to sell a strata lot at various prices and the devaluation of the Canadian dollar could not be relied upon to establish hardship

- economic hardship alone is insufficient to establish hardship; however, economic hardship combined with a “leaky condo” is probably “hardship”
- the question of hardship must be decided based upon the facts of each particular case
- loss of rental revenue as a result of a new ban on rentals combined with a decrease in resale value constituted financial hardship
- evidence showing that the strata lot owner may face financial ruin due to debt service constituted hardship
- inability to sell a strata lot alone is not a sufficient ground to find hardship

Other factors to consider may include:

- inability to obtain insurance because a unit is not occupied
- potential prohibitive cost of property management
- substantial decrease in sale value
- the strata lot value making up all or substantially all of an owner’s assets
- there must be hardship to the owner
- there must be proof that carrying two properties causes hardship to the owner

a duplicated expense for a rich owner may not cause hardship; however, a duplicated expense for a poor owner may cause hardship

The Als case suggests that objective documentary evidence to establish financial hardship must be produced by an owner. The owner may not simply allege that a certain fact exists. He or she must prove it with adequate evidence. The statute suggests that the test for hardship may be subjective ie. that particular owner must suffer hardship. However, hard evidence is required to prove that the hardship exists. Strata Council members should not hesitate to demand access to documentary evidence, even if it is otherwise confidential or embarrassing to the owner.