

VOTING THRESHOLD REVISITED

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Many strata corporations question how to raise money to obtain a depreciation report or to address depreciation report recommendations at a general meeting of owners and whether related resolutions may be amended at general meetings.

The resolution forms the funding foundation and confirms the scope of work. If it falls for any reason, then so does the mandate, including the ability to collect the expenditures. Contractors and others rely upon this mandate for payment. The process could become a house of cards.

Legislative Amendments

Recent amendments to the *Strata Property Act* ("Act") make it easier for strata corporations to repair and maintain their buildings. Effective April 9, 2014, the Act was amended to change the threshold vote from a $\frac{3}{4}$ vote to a majority vote to fund expenditures out of the contingency reserve fund ("CRF") to obtain a depreciation report and to pay for the work recommended in the most recent depreciation report (ss. 96(b)(i) (A)(I) & (II), Act). A further amendment permits a strata corporation to include expenditures to obtain a depreciation report as part of the annual budget which requires a majority vote for approval. Special levy resolutions and other non-emergency CRF expenditures still require a $\frac{3}{4}$ vote of owners at a general meeting (s. 108, Act).

The objective of the legislation was to make it easier for strata corporations to prepare a depreciation report and to proceed with repair programs recommended in a depreciation report in a planned, reasonable and timely fashion to meet the mandatory statutory duty to repair imposed by the Act.

Resolutions

There are essentially 3 different types of resolutions at issue when addressing owner approval for depreciation report related expenditures at a general meeting, summarized as follows:

1. Budget Resolution: A resolution to approve the annual budget by majority vote at an annual general meeting ("AGM") which includes a line item to obtain a depreciation report payable out of the operating fund (annual or greater than annual expenditures);
2. CRF Resolution: A resolution to approve funding to obtain a depreciation report or act on the recommendations set out in such a report payable out of the CRF by majority vote (greater than annual expenditures); and,
3. Other Resolutions: A $\frac{3}{4}$ vote resolution to approve funding for all other greater than annual repair expenditures by special levy or out of the CRF.

It is important for strata corporations to distinguish between operating expenditures which "usually occur either once a year or more often than once a year" (items included in the budget) requiring a majority vote and other expenditures which "occur less often than once a year or that do not usually occur" (s. 92, Act). Prior to the legislative amendments, the latter expenditures required a $\frac{3}{4}$ vote for approval subject to limited statutory exceptions. The legislation created exceptions to the general rules by lowering the threshold vote to address depreciation report matters to a majority vote. Currently, if the CRF is inadequate to cover depreciation report expenditures and such expenditures are not included in the annual budget, then a special levy requiring a $\frac{3}{4}$ vote would be necessary to provide funding approval.

Prior to the recent legislative amendments, only expenditures that "usually occur either once a year or more often than once a year" could form part of the operating fund, and CRF expenditures that "usually occur less often than once a year or that do not usually occur" required a $\frac{3}{4}$ vote (s. 92, Act). The legislation previously prohibited the inclusion of such expenditures in the budget.

There is a significant difference between a majority vote and a $\frac{3}{4}$ vote. For example, if there are 100 strata lots in the strata corporation and everyone attends and votes (no abstentions), then majority vote approval requires 51 votes in favour as compared to 75 for a $\frac{3}{4}$ vote. Legislative amendments lowering the threshold vote is viewed as a major and welcome change.

We will review each of the above resolutions and provide some practice tips to illustrate the legislative changes.

Scenario 1: Budget

The strata corporation wishes to obtain a depreciation report for the first time. The budget sent to the owners as part of an AGM Notice Package budgeted \$10,000.00 for this purposes, being the amount paid by a neighboring strata corporation. Prior to the AGM, the council receives confirmation that the quote for the depreciation report is \$15,000.00.

The strata corporation prepared and send a notice package for the AGM to the owners in the customary course of events, including an agenda and a draft budget. A line item in the budget included \$10,000.00 to obtain a depreciation report. Otherwise, no specific resolution was included on the Agenda or in the Notice of Meeting to address this expenditure. After the notice package was sent to the owners, but prior to the AGM, the strata corporation received a quote of \$15,000.00 to prepare the depreciation report from a qualified person being \$5,000.00 more than the line item amount set out in the budget.

Can the depreciation report costs be included as part of the annual budget, and if yes, can the budget be increased by \$5,000.00 at the AGM to cover the costs to obtain the report?

In this case, a depreciation report has never been obtained by this strata corporation. Therefore, this expenditure may be characterized as a "one-time non-emergency expenditure" or a "greater than annual expenditure". Before April 9, 2014, such an expenditure could only be approved out of the CRF or by special levy by a $\frac{3}{4}$ vote of owners at a general meeting. After April 9, 2014, the legislative amendments permit funding out of the operating fund to the extent "necessary to obtain a depreciation report under section 94" (s. 92(a)(ii), Act). In other words, this expenditure can form a line item in the annual budget which requires a majority vote for approval since \$15,000.00 is "necessary" to pay for the depreciation report costs.

Can the budget be amended at the AGM to increase the depreciation report line item from \$10,000.00 to \$15,000.00? Yes, as long as the budget does not exceed what is "necessary" to obtain the depreciation report and the amendment to the budget is addressed before the budget itself is put to a vote (s. 103(3), Act). If the amendment and the budget are both approved by a majority vote of owners at the AGM, then the strata corporation may make the expenditure out of the operating fund to obtain the depreciation report in the ordinary course.

What if the cost to obtain the depreciation report is actually \$15,500.00 or \$500.00 over-budget. How may the strata corporation address the excess cost? The easiest process would be for the council to authorize the additional \$500.00 as an unauthorized expenditure payable out of the operating fund pursuant to section 98 (2) of the Act. The expenditure must be "necessary" to obtain the depreciation report and subject to the bylaws, the expenditures cannot exceed "\$2,000.00 or 5% of the total contribution to the operating fund for the current year, whichever is less". The strata corporation should amend its bylaws to ensure that such expenditures are reasonable given the size, complexity and age of the complex. It is not unusual to see \$10,000.00 for a 25 unit complex and \$25,000.00 for a 50 unit complex.

Scenario 2:

The strata corporation is concerned that the roof has lived out its service life and requires replacement. An owner who paints for a living estimated that the roof replacement cost would be around \$300,000.00. The depreciation report recommends immediate replacement of the roof. The owners are willing to authorize this expenditure. The strata corporation called a special general meeting ("SGM") to approve the roof replacement costs recommended in the depreciation report by majority vote. After calling the meeting, the strata corporation received three estimates to replace the roof from qualified roofers. The lowest quote was \$450,000.00. The owners are shocked. What should the strata corporation do to address this situation?

The strata corporation should seek legal advice immediately. There are many questions, including whether the SGM should proceed since the roofing quote has increased by a substantial amount. Can the resolution be amended at the general meeting? From a political perspective, will the owners support the increased expenditures? What is the process?

First of all, a resolution authorizing expenditures out of the CRF outlining the mandate should be drafted by a lawyer and included in the notice package. Such a resolution should address the nature and the scope of the mandate for the expenditures. In other words, a resolution merely authorizing expenditures for "roof replacement" is not sufficient. The resolution should address the scope of work which may include demolition, disposal, landscaping, building envelope repairs, wall to roof detailing, soffit and eaves troughs and other necessary work. It should include a contingency for unforeseen expenditures to address mold, rot or other remedial work, together with an approval process to address change work orders. Moreover, there could be expenditures for permits, warranty, professionals, legal and other such matters. There are other considerations that should be addressed in the resolution.

The strata lawyer should address whether the proposed expenditures out of the CRF can be approved by a majority vote. If a portion of the scope of work is not yet recommended in the depreciation report, then payment for such expenditures cannot be authorized out of the CRF. For example, are expenditures to replace disturbed landscaping due to scaffolding required to replace the roof related to the roof replacement? It likely is. However, if scaffolding is not required to access the roof, then such an expenditure cannot be included as part of the proposed CRF expenditure by majority vote.

There is no case law yet on this issue. However, it is anticipated that owners will challenge the jurisdiction of the strata corporation to make expenditures by majority vote out of the CRF which exceed the legislative mandate. Caution is recommended.

The proposed expenditure must meet the following test in order to qualify as a majority vote for expenditures out of the CRF:

"the expenditure is related to the repair, maintenance or replacement, as recommended in the most recent depreciation report obtained under section 94, of common property, common assets or portions of a strata lot which the strata corporation has taken responsibility for under section 72(3), ..."

There could be a question regarding whether limited common property such as a rooftop area for a penthouse owner is "common property". Who pays the cost to remove, dispose of and possibly replace improvements such as a hot tub, decking and other improvements installed over the common property roofing membrane? Is this a qualifying expenditure? A strata corporation must comply with the statutory preconditions to the letter.

The roof replacement resolution qualifies since roof replacement to common property was recommended in the current year by the most recent depreciation report.

What happens if the CRF is insufficient to pay for the proposed remedial work? In my view, the strata council is not acting honestly and in good faith and in the best interests of the strata corporation if it presents a resolution for approval knowing there are insufficient funds available in the CRF to cover such expenditures at the time the resolution is approved. This could expose the council members and the strata corporation to unnecessary and unquantifiable liability if the contractor walks off the job, as it is entitled to do, if funding is insufficient to pay the progress draws as they fall due. If the roof has been removed exposing the building envelope to the elements and the rainy season is approaching, the consequences could be catastrophic to the strata corporation.

The strata corporation could consider phasing the work as long if there is more than one roof in issue. In this event, the strata corporation could perform the most urgent work now subject to the availability of CRF monies and then approve the remaining work and the related funding at a later date.

Any change to the resolution at the general meeting would require an amendment to the resolution. The council asks whether the resolution authorizing expenditures out of the CRF by majority vote can be amended at the SGM. Section 50(1) of the Act prohibits amendments to the proposed wording of a $\frac{3}{4}$ vote if the amendment substantially changes the resolution. In my view, increasing the expenditure from \$300,000.00 to \$450,000.00 is a substantial change. If the amendment reduced the proposed expenditure to \$250,000.00, for example, then some argue that this is not a substantial change. In my view, an "insubstantial change" is limited to correcting a typo or punctuation.

However, the proposed resolution calls for a majority vote – not a $\frac{3}{4}$ vote. In my view, an amendment to the resolution is not caught by section 50(1) of the Act. Section 50 only applies to a $\frac{3}{4}$ vote resolution. It does not apply to a majority vote. Therefore, the amendment is permissible, but the change would not be acceptable if the CRF funding is otherwise inadequate.

Scenario 3:

The re-roofing project is underway. The strata corporation is informed that the costs have escalated due to water damage. The roofing cost has increased from \$450,000.00 to \$700,000.00. The strata corporation only has \$450,000.00 in the CRF. The rainy season is approaching and the strata corporation is concerned that any delays in completing the project could result in significant loss or damage to the building from water penetration and possible mold. What should the strata corporation do to raise the remaining \$250,000.00 necessary to complete the project?

Since there are insufficient funds in the CRF and assuming that the additional work is not recommended in the most recent depreciation report, any additional expenditures requires a $\frac{3}{4}$ vote. An information meeting of owners should be held as soon as possible to explain the increased expenditures with the professionals in attendance to answer questions. A general meeting should be held as soon as is practical to approve the additional expenditures by $\frac{3}{4}$ vote.

This type of foreseeable problem can be addressed before the project begins by commissioning a proper investigation by a qualified building envelope professional or engineer. This report is required in addition to the depreciation report. Also, the lawyer may assist by ensuring that any legal constraints are properly addressed.

It is now easier to obtain planning tools (depreciation report) and to raise the funds for recommended major repairs. However, this is not a licence for short cuts. The qualified professionals should be brought in at an early stage, including the strata lawyer, to assist with the planning and implementation process to ensure a smooth and successful outcome which minimizes disputes and liability.

In my view, the proposed expenditure likely does not qualify as an emergency expenditure. Moreover, there are insufficient monies in the CRF to cover the additional \$250,000.00. A special levy requiring a $\frac{3}{4}$ vote of owners is required to authorize the additional funds.

If the strata corporation fails to obtain this vote at a general meeting called for this purpose, but it receives a majority vote, then it may consider litigation as a fall-back position. The legislation was amended December 12, 2013 to permit a strata corporation to bring an application to the Supreme Court to approve a repair resolution in these circumstances. This application must be made within 90 days after the vote (s. 173(2), Act).

The strata corporation must act in a reasonable and in a timely fashion when addressing repair issues. It should ensure that it retains appropriate professionals to assist it with this complex process including a strata lawyer, building envelope professional, engineer, contractor, strata manager and other qualified persons.