

OWNERS REIMBURSING STRATA CORPORATIONS FOR HIGH INSURANCE DEDUCTIBLES

By Elaine T. McCormack, J.D.

Published in the Winter 2019 edition of the CHOA Journal

Many strata corporations are now facing increased insurance premiums and higher insurance deductibles.

When a strata corporation has a large insurance premium increase, it may have difficulty paying for it and the strata council must consider what to do.

Typically, strata corporations have bylaws that address what happens when there is an insurance claim made on the strata corporation's policy. These bylaws bolster the strata corporation's ability to obtain reimbursement of an insurance deductible from an owner when the owner is "responsible" for the damage that is the subject of the insurance claim.

As a result of higher deductibles, such as \$100,000 for water damage, some strata council members are wondering whether a single owner should be responsible to reimburse the strata corporation for the cost of the insurance deductible.

Is it unfair to require an owner to reimburse the strata corporation for such a large deductible, even if the owner is legally "responsible" to do so under section 158 of the *Strata Property Act*? Strata council members are asking what will happen if an owner does not obtain his or her own insurance coverage to reimburse the strata corporation for its insurance deductible and cannot otherwise pay it.

This article will discuss:

- (a) Paying for increased insurance premiums;
- (b) the general principles regarding the strata corporation's ability to seek reimbursement from an owner for an insurance deductible;
- (c) typical bylaws provisions addressing this issue;
- (d) the implications of adopting a bylaw that provides that the strata corporation will not seek reimbursement from owners of insurance deductibles; and
- (e) the possibility of adopting a bylaw that allows the strata corporation to seek reimbursement from the owner of a deductible of up to a certain amount or in certain situations.

A. Paying for Increased Insurance Premiums

A strata corporation's insurance premium is an expense properly funded through the operating budget. It is possible to lend money from the contingency reserve fund to the operating fund as per section 6.3 of the Regulations to the *Strata Property Act* as follows:

Management of contingency reserve fund

6.3 (1) For the purposes of [section 95 \(4\)](#) of the [Act](#), the strata corporation may only lend money in the contingency reserve fund to the operating fund if both of the following conditions are met:

- (a) the loan is to be repaid by the end of that fiscal year of the strata corporation;
 - (b) the loan is for the purpose of covering temporary shortages in the operating fund resulting from expenses becoming payable before the budgeted monthly contributions to the operating fund to cover these expenses have been collected.
- (2) The strata corporation must inform owners as soon as feasible of the amount and purpose of any loan made under this section.

The problem arises when the amount for insurance in the operating budget for the fiscal year is insufficient to pay for the insurance premium and does not fit within the allowable parameters for unapproved expenditures.

Some strata corporations enter into a loan to pay the cost of the insurance premium. Considering the yearly insurance premium for some strata corporations may be over \$100,000 and the loan attracts interest, the amounts involved can be significant. Pursuant to section 111 of the *Strata Property Act*, a strata corporation can borrow money after the action is approved by a $\frac{3}{4}$ vote resolution passed by the owners at an annual or special general meeting. A strata council should seek legal advice if the operating fund will be insufficient to pay for the insurance premium.

B. General Principles

Even though an owner is responsible to repair and maintain his or her own strata lot, the strata corporation has an obligation to insure certain portions of strata lots under the strata corporation's insurance. Section 149 of the *Strata Property Act* provides as follows:

Property insurance required for strata corporation

- 149** (1) The strata corporation must obtain and maintain property insurance on
- (a) common property,
 - (b) common assets,
 - (c) buildings shown on the strata plan, and
 - (d) fixtures built or installed on a strata lot, if the fixtures are built or installed by the owner developer as part of the original construction on the strata lot.
- (2) For the purposes of subsection (1) (d) and section 152 (b), "fixtures" has the meaning set out in the regulations.
- (3) Subsection (1) (d) does not apply to a bare land strata plan.
- (4) The property insurance must
- (a) be on the basis of full replacement value, and
 - (b) insure against major perils, as set out in the regulations, and any other perils specified in the bylaws.

Pursuant to section 158 of the *Strata Property Act*, a strata corporation may sometimes seek reimbursement from an owner for the cost of a deductible:

Insurance deductible

158(1) Subject to the regulations, the payment of an insurance deductible in respect of a claim on the strata corporation's insurance is a common expense to be contributed to by means of strata fees calculated in accordance with section 99 (2) or 100 (1).

(2) Subsection (1) does not limit the capacity of the strata corporation to sue an owner in order to recover the deductible portion of an insurance claim if the owner is responsible for the loss or damage that gave rise to the claim.

(3) Despite any other section of this Act or the regulations, strata corporation approval is not required for a special levy or for an expenditure from the contingency reserve fund to cover an insurance deductible required to be paid by the strata corporation to repair or replace damaged property, unless the strata corporation has decided not to repair or replace under section 159.

When there is a claim on the strata corporation's insurance, the strata corporation is always responsible to pay for the deductible. The strata corporation can seek reimbursement from the owner for the cost of the deductible if the owner is responsible for the damage. The strata council can seek reimbursement of the deductible by making a demand to the owner. If the owner does not pay, the strata council can file a complaint with the Civil Resolution Tribunal or commence arbitration. If the owners fails to pay an amount awarded by the Civil Resolution Tribunal or the arbitrator, the council may need to file the decision or award in Court and commence court proceedings to collect the amount owing.

An owner can be "responsible" even if the owner is not negligent. An owner is generally legally responsible for deductibles that arise because of a fixture or appliance failing in his or her strata lot, even if the owner is not negligent. For instance, a toilet seal can fail through no fault of the owner.

The strata council can render a special levy without the permission of the owners to pay for an insurance deductible from funds from the contingency reserve fund. Even a healthy contingency reserve fund may be severely depleted if there several large insurance deductibles paid from it.

C. Traditional Bylaw

Strata councils are frequently advised by lawyers to propose a bylaw for consideration of the owners that bolsters the strata corporation's ability to obtain reimbursement of insurance deductibles from individual owners. Strata councils have been cautioned against having bylaws that limit the strata corporation's ability to obtain reimbursement to situations when the owner is negligent, as it can be difficult to prove negligence.

D. Bylaws Prohibiting or Limiting Reimbursement by Owner

A bylaw can be enacted that prohibits the strata corporation from seeking reimbursement of an insurance deductible from an owner. The Civil Resolution Tribunal may find that such a bylaw is supported by the *Strata Property Act* and is enforceable.

Section 72(3) of the *Strata Property Act* allows a strata corporation to take responsibility for the repair and maintenance of specified portions of a strata lot. It can be argued that paying for an insurance deductible is like paying for a repair and therefore, the strata corporation has the right to enact a bylaw that provides that it will not seek reimbursement of an insurance deductible from an owner. There are concerns with this type of bylaw. One concern is whether the bylaw will be enforced by the Civil Resolution Tribunal. Another other concern is that it places no responsibility on owners to behave responsibly. A strata corporation with such a bylaw may have to pay for several insurance deductibles due to the negligent actions of one owner and will have no recourse to seek reimbursement of the deductible from the owner.

E. Negligence Bylaw

Each strata council has the option of proposing a bylaw that offers a nuanced approach. For instance, a strata council may propose a bylaw for the consideration of the owners at a general meeting that limits the collection of an insurance deductible from an owner to a certain amount, say the first \$50,000.00. A strata council could also propose a bylaw that limits the strata corporation's right to seek reimbursement of a deductible from an owner to situations when the owner is negligent. A hybrid bylaw utilizing both of these concepts could also be proposed.

Strata councils who are considering proposing a bylaw that deals with insurance deductibles should seek legal advice. The lawyer can explain the type of evidence that will be required to prove that an owner, tenant or occupant was "negligent". Proving someone is negligent in their own home can be very difficult. The lawyer can also explain any new CRT and Court decisions and how they may impact the enforceability of the bylaw. In addition, a lawyer can provide advice on the best wording for the bylaw.

Keep in mind that bylaws may be in effect for a long time. By enacting such a bylaw, the strata corporation may be forgoing the ability to collect funds in amounts and in situations no one can predict at the time the bylaw is passed. Enacting such a bylaw may preclude the strata corporation from collecting amounts from owners that the owners could easily obtain their own insurance coverage for.

F. Conclusion

Strata councils considering proposing bylaws for the consideration of the owners at a general meeting regarding insurance deductibles should seek legal advice. Similarly, if financing is required to pay for an insurance premium, legal advice should be sought regarding whether this action requires approval by way of a ¾-vote resolution of the owners.