

Questions & Answers with Robert Noce



CCI member Robert Noce, Q.C. contributes a regular column to the Edmonton Journal, answering questions from readers about various aspects of condominium living. These are questions that tend to arise fairly frequently, so Mr. Noce and the Edmonton Journal have kindly allowed InSite to republish some of them for our continuing education on the condominium life.

Robert Noce, Q.C. is a partner with Miller Thomson LLP in both the Edmonton and Calgary offices. He welcomes your questions at condos@edmontonjournal.com.

Answers are not intended as legal opinions; readers are cautioned not to act on the information provided without seeking legal advice on their unique circumstances.

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Q: Our condo board is planning an expensive cosmetic renovation of the building interior. Most of the owners agree that there are more pressing issues that ought to be dealt with first. Our reserve fund is average, so the directors will borrow money from it for the project, and impose a special levy next year to bring the reserve fund up again. Is there anything the owners can do to put the brakes on this project?

A: First, you should determine whether or not your board is complying with the law relating to reserve funds. There are specific provisions under the Condominium Property Act and Regulations that deal with taking money from the reserve fund. Second, there is a provision under the Condominium Property Act that gives owners the ability to provide direction to the board. This would require a formal vote of the owners at a general meeting. On the other hand, it's important to remember that improvements to your building add value to your unit.

Q: Your article with respect to Special Resolutions made it clear that any bylaw amendment requires at least 75 per cent of the owners and unit factors. Could you clarify what is required to direct the board to do certain things? My understanding is that the owners can pass motions at a general meeting with at least 25 per cent of them in attendance. Is this correct?

A: The Condominium Property Act makes it clear that the owners can pass a resolution at a general meeting that provides direction to the board. To convene a general meeting, you will need to meet the requirements of quorum as set out in your bylaws. If the threshold is low, then a small group of owners can wield a significant amount of power.

Q: What steps can we take as a condominium corporation to force the back payment of condo fee arrears? We do not have the resources for a prolonged legal battle, but we cannot simply allow this to continue until the unit is sold.

A: First, file a caveat on the title. The caveat will provide the owner with notice that they are in arrears. Second, write a letter to the owner's mortgage company asking them to pay; most banks will. Every owner should read their mortgage agreement and realize that if they do not pay their condo fees, they are in breach of their mortgage, which could trigger foreclosure proceedings against the owner by the bank.

If neither the caveat nor the letter to the bank result in a positive reply, then another alternative is to wait until this unit is sold and collect your money. If you need the money now, then retain a lawyer to begin foreclosure proceedings against the owner. The good news about

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the foreclosure process is that the condominium corporation may get most of its legal costs back.

Q: I am a condominium board member, as well as a landlord. Our board has recently implemented a rule that every landlord must put a deposit down for hallway repairs in case a tenant damages the common property. Is this fair, given that anyone moving out, tenant or owner, could damage the common property? Can the condominium corporation enforce this rule if it is not written in the bylaws?

A: The Condominium Property Act does allow a condominium corporation to require owners who rent out their units to pay a deposit that can be used for repairs or replacement of common property that is damaged, destroyed, lost or removed by any person in possession of the unit. The deposit amount cannot exceed one month's rent charged for that unit. If your board chooses to enforce this, you will have to comply and provide proof of the monthly rent amount.

Helpful hint: There are other legal requirements under the Condominium Property Act that the condominium corporation

should use when dealing with tenants. An owner who is renting out their unit must provide the address where they may be served with any notice, and advise on how much rent is charged for the unit. The unit owner must also give written notice of the name of the tenant renting the unit within 20 days from the start of the tenancy.

Q: Our condo board took over from the developer about a year ago. There were some outstanding deficiencies. We have contacted the developer, who is from another province, and they will not make the repairs. Do we have any recourse?

A: You may have some recourse against the developer, subject to determining whether or not these are developer deficiencies and whether you are within the time limit to bring an action. You need to determine whether the developer is worth pursuing through the litigation process. As well, you may want to look at the New Home Warranty program to determine whether or not there are any opportunities for assistance in this regard. If you do not pursue the developer or if the New Home Warranty does not

apply, your only alternative may be to ask owners to contribute to the repairs.

Helpful hint: The onus is on the condominium corporation to pursue these issues against the developer. It is worth retaining legal counsel to analyze whether or not a claim against the developer is worth pursuing.

Q: In 2007, with legal counsel, our condo board developed new bylaws. Ratifying these bylaws has been a challenge, and we have just recently obtained the required number of signatures and the required unit factors. All the signatures are from the current owners, but our property manager believes that given the "age" of the signatures, we should canvass

some of the same owners again. Do you agree?

A: If an owner signed the resolution in favour of a bylaw amendment a few years ago and remains an owner today, I would take the position that the resolution is valid. The owner, at any time, could withdraw his approval, and the onus would be on the owner to do so. There is nothing under the Condominium Property Act that requires you to go back to the owners and seek their approval again.

If, however, an owner signed the bylaw amendment a few years ago and that owner no longer lives in the condominium project, then you would need to go to the current

owner and ask whether or not they support the bylaw amendments. *Helpful hint: Although there is no legal requirement forcing you to go back to the owners who have approved the bylaw amendments, there is nothing preventing you from seeking a reaffirmation of their position. However, going back to the owners may create issues where none exist today.*

Q: Our condominium board has made some major decisions, such as repainting and re-flooring, without owner input. We learned of the flooring decision by way of a one-sheet information bulletin stating that the common area carpeting will be replaced this fall with tiles. Should decisions like these be discussed in



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advance with the owners?

A: Generally, decisions about improvements or repairs in common areas are the responsibility of the board. I am assuming that the board is following a capital reserve fund study, which has identified these repairs/replacements of property. Funds cannot be removed from the capital reserve fund unless authorized by a special resolution. After the removal of the funds, there must be sufficient funds remaining to meet the requirements of the capital replacement reserve study. You will need to review the capital reserve fund study to determine whether or not the board has complied with the Condominium Property Act.

Helpful hint: The Condominium Property Act sets out a number of steps to follow to access funds through the reserve fund. If a board fails to follow the law, an owner or owners can go to court to challenge its decision. Review your by-laws to determine whether or not owners have the authority to call an extraordinary general meeting to deal with this issue.

Q: I have been on my condominium board for just over a year. Our condominium corporation was in

dire financial straits when I joined. Bills were not being paid, and landscapers and janitors were walking off the job. At the last AGM, I was elected treasurer. Having just prepared the budget for the year, I am suggesting an increase of over 14 per cent in condo fees for our operating budget.

The biggest increase comes from the reserve fund contributions, which are dictated by our reserve fund study. I have been working hard to get expenses down, but the other board members do not want to make the required contributions to the reserve fund. Two of the three board members are moving at the end of this year and it is in their best interest to keep condo fees low with no assessments.

Our losses this year will be over \$50,000. Are we required to contribute to the reserve fund study for any given year? Can a board just make a motion to have money paid out of the reserve fund even if it does not relate to anything in the study?

A: Your condominium corporation has a significant problem. Some boards deliberately keep condo fees low to create the illusion that theirs

is a cost-effective building. Unfortunately, that approach is short-sighted because at some point in the future, you will be required to make the necessary repairs and/or replacements to property owned by the corporation. Another concern is that your operating budget will be at a loss if you do not increase your condo fees.

Boards are required to act in good faith for the benefit of the condominium corporation. If board members fail to do so, they expose themselves to personal liability. The Condominium Property Act is clear that contributions to the reserve fund should be made so that the money is available when the need arises for the particular undertaking. You cannot take funds from the reserve fund unless authorized by a special resolution. As well, it is against the law to take funds from the reserve fund to pay for items not listed in the reserve fund. Reserve funds are not a "slush fund" for the board.

Helpful hint: In your case, owners need to come together to force the board to make some tough decisions. You may want to hire a lawyer to provide the board with information on their legal requirements.

Your situation is no longer sustainable and requires immediate attention.

Q: The tenant in the condominium unit next door plays loud bass music most nights, usually from 10 p.m. until 3 a.m., which prevents me from sleeping well. I have talked to the tenant and the condo board. The condo board has written to the tenant, but nothing has changed. I have also phoned the police several times, but they have more urgent priorities. How can I solve this problem?

A: Noise complaints are difficult. So far, you have done the right thing in terms of having a discussion with the tenant and the board. Your bylaws should have a provision regarding noise. Look at your bylaws to determine whether or not the board can impose a fine against

the owner of the unit. If the tenant is in breach of the bylaws, the condominium board must deal with the noise complaint. The owner of the unit would be responsible for his/her tenant.

Helpful hint: When dealing with a noise complaint, evidence is critical. You should document or record the noise in case court proceedings are necessary.

Q: Our 35-unit condo is 20 years old, and the bylaws desperately need updating. Where does legal advice come in?

A: There are many ways to start the process of reviewing and amending your bylaws. Some boards create a committee and seek the opinions of owners in terms of possible amendments. Other boards take on the

responsibility themselves to have open houses and information sessions to get feedback and provide information to owners about possible changes to the bylaws. It can be a lengthy process.

As well, you will need to engage a lawyer to help you draft the bylaws so that the wording is consistent with the Condominium Property Act and Regulations, and to ensure that none of your proposed amendments conflict with one another. When you decide to engage the lawyer is up to you. Some boards engage the lawyer at the beginning of the process and maintain that relationship throughout, while others engage a lawyer near the end of the process, when the drafting needs to take place.

When you engage a lawyer



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at the beginning of the process, your costs will increase; however, when you engage a lawyer for the last step only, there may be delays and further costs associated with clarification, changes and conflicts.

Helpful hint: Reviewing your bylaws from time to time is helpful to ensure that they are current and make sense for today's owners. You require 75 per cent of the owners and unit factors to support any bylaw amendment.

Q: I live in a high-rise condo, and have problems with dirty water backing up in the bathtub. The property management company sent

a plumber who had to clear the line three times to 25 feet to unplug it.

Because they had to clear the line as far as they did, I do not believe that the blockage originated in my condo, and I do not want to pay the plumbing costs, but the board wants me to pay. Who should pay for plumbing?

A: I cannot answer this question without knowing more about the particular backup. For instance, I would want to review your condominium plan, as well as the repair details, to determine whether or not the problem occurred on common property, on your

property or on another owner's property.

Helpful hint: Plumbing problems are tricky, because the network extends to all units. The condominium plan is always the best place to start when trying to figure out who is responsible for paying for which repairs.

Q: I am a member of my condo board with 100-plus units. We are struggling financially, and have some major repairs ahead of us. We are dissatisfied with our current property management company, and half the board wants to self-manage in an effort to save money. I disagree. Is self-management a wise decision given the number of units?

A: The Condominium Property Act does not require Condominium Corporations to hire a property management company. The reason that Condominium Corporations do so is because most board members do not have the time to take care of the many administrative responsibilities of a Condominium Corporation, such as collecting condominium fees and dealing with complaints.

Before deciding, the board should determine what things the property management company does, and who on the

board would take on those responsibilities if you terminate your property management company. As well, you stated that you are struggling financially as a Condominium Corporation. Is this the fault of your property management company, or is it because the board (and previous boards) failed to make important financial decisions about the future of your Condominium Corporation? Are your condominium fees too low? Have you not budgeted properly to deal with the day to day responsibilities and future needs of the Condominium Corporation? Your question cannot be answered with a simple yes or no.

Rather, you should retain an accountant or a lawyer to assist you in understanding how you can get your financial house back in order. Finally, the board needs to fully grasp its responsibilities if you decide to self-manage.

Helpful hint: Property managers play a vital role in condominium living. The right property manager will significantly lower board members' workloads, and provide service to owners on timely basis. You should shop around and interview prospective property managers if you are not currently satisfied.

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