

Changing the Allocation of Common Expenses

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Common expenses are generally shared by owners in a strata development based on unit entitlement. However, the general rule regarding common expenses has several exceptions. This article outlines the general rule and two exceptions that require unanimous votes of the owners. It also deals with the nature of a unanimous vote and how it may be passed. Future articles will outline other methods for changing the allocation of common expenses.

A. How Expenses are Normally Divided under the *Strata Property Act*

Section 99 of the *Strata Property Act* sets out the basic calculation of a strata lot's share of the total contributions budgeted for the operating fund and the contingency reserve fund. The calculation is as follows:

$$\frac{\text{unit entitlement of strata lot}}{\text{total unit entitlement of all strata lots}} \times \text{total contribution}$$

For strata lots that are solely residential or solely commercial, the unit entitlement of each strata lot is often based on the habitable area of the strata lot. However, the unit entitlement can simply be set at a whole number that is the same for all strata lots or a number approved by the Superintendent of Real Estate, which in the opinion of the Superintendent allocates a fair portion of the common expenses to the owner of the strata lot.

For older developments, the schedule of unit entitlement is located in the strata plan registered in the land title office. Make sure that you refer to the schedule that has been registered in the land title office and not the schedule set out in the disclosure statement filed by the developer, as the schedules may be different. For strata corporations created under the *Strata Property Act*, a Form V Schedule of Unit Entitlement is registered in the land title office along with the strata plan.

It is also important to check to see if any bylaws have been registered that create sections or types.

B. Changing the Formula for Contributions to the Operating Fund and the Contingency Reserve Fund

Pursuant to section 100 of the *Strata Property Act*, strata corporations can use another formula to calculate a strata lot's contribution to the operating fund and contingency reserve fund as long as that formula is agreed upon by a unanimous vote at an annual or special general meeting that happens after the first annual general meeting. Section 100 permits a great deal of flexibility with respect to how contributions to the operating and contingency reserve funds can be calculated.

Section 100 provides as follows:

Change to basis for calculation of contribution

100 (1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the

regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.

(2) An agreement under subsection (1) may be revoked or changed by a resolution passed by a unanimous vote at an annual or special general meeting.

(3) A resolution passed under subsection (1) or (2) has no effect until it is filed in the land title office, with a Certificate of Strata Corporation in the prescribed form stating that the resolution has been passed by a unanimous vote.

If a strata council wants to propose a change to the allocation of common expenses to be considered by the owners, it is critical that the wording of the resolution be absolutely clear about how future expenses will be allocated amongst the owners. Even if all of the owners are in agreement about the meaning of the resolution at the time it is passed, future owners may interpret the resolution differently and refuse to honour the original intention of the resolution if it is worded vaguely.

The resolution must explicitly authorize the strata council to endorse and file a Certificate of Strata Corporation in Form E. The Form E Certificate of Strata Corporation must be filed in the land title office in order for the unanimous vote to have effect. The Form E has 5 variations depending upon what type of resolution has been approved for registration with the land title office. Take care to ensure that the Form E used is the correct version, and explicitly refers to section 100 of the *Strata Property Act*.

There are special requirements for phased developments to follow if they wish to make use of section 100. Pursuant to section 13.3 of the Regulation to the *Strata Property Act*, the written consent of the developer is required under certain circumstances.

Given the rigours of actually passing a unanimous vote, section 100 is most likely to be relied on in strata corporations with a small number of strata lots. Section 100 is helpful in legitimizing practices that a strata corporation may have had for some time. For instance, if a strata corporation is comprised of four strata lots, with two buildings, each containing two strata lots, the owners of each building may have been paying for long term repairs separately. Passing and registering a unanimous resolution pursuant to section 100 would allow them to legally contribute to the contingency reserve fund for their own building's long term repair expenses and would ensure that future owners would be bound to that practice unless a further unanimous vote is passed changing it.

A resolution passed under section 100 allows for a re-allocation that may change the percentage of the contribution of each strata lot for a certain expense or may exclude certain owners from contributing to the payment of a particular expense at all.

C. Changing the Formula for Contributions to a Special Levy

Pursuant to section 108 of the *Strata Property Act*, a strata corporation can calculate a strata lot's share of a special levy in any way that establishes a fair division of expenses as long as the levy is approved by a resolution passed by a unanimous vote at an annual or special general meeting.

Section 108(2) provides as follows:

108 (2) The strata corporation must calculate each strata lot's share of a special levy

(a) in accordance with section 99 or 100, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

(b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.

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So, section 100 deals with operating expenses and contingency reserve expenses and section 108 deals with special levies. Special levies can be raised to pay for operating expenses and to pay for expenses that would normally be paid for out of the contingency reserve fund. Although one resolution passed under section 100 seals the fate of the owners regarding how operating expenses and contingency reserve budget will be allocated unless a subsequent unanimous resolution is passed, relying on section 108(2) requires that a new unanimous resolution be passed each time the allocation of a special levy does not follow unit entitlement allocations.

Therefore, if certain owners are contributing more for a particular expense in accordance with the formula filed under section 100 than they would by unit entitlement, those owners may decide that they would prefer that the expense be paid for by special levy. If those owners have the numbers to pass a special levy, there is likely going to be dispute between the owners regarding how the expense should be apportioned between them. As passing a unanimous resolution under section 100 is rare, it will likely be many years before this type of dispute is brought before a judge of the Supreme Court of British Columbia and a decision is made on this issue.

D. Passing Unanimous Resolutions

A unanimous vote requires a vote in favour of the resolution by all strata lots. As a result, if a vote is taken at an annual or general meeting and an owner does not attend the meeting by person or by proxy, the resolution fails. It also fails if an owner abstains from voting. As a result, if you are trying to pass a unanimous resolution, it is crucial to check with all of the owners and ensure that they are going to attend in person or by proxy.

If two or more owners share one vote with respect to a strata lot, only one of them may vote. However, if there are two owners of a strata lot and one of them wants the unanimous vote to pass and one of them does not, their vote would not be counted and the unanimous resolution would fail.

If arranging for all owners to attend a general meeting, either by person or by proxy, is an issue you can try to pass the unanimous vote without holding a general meeting. Pursuant to section 44 of the *Strata Property Act* each owner can waive, in writing, the holding of a special general meeting and consent, in writing, to a resolution. Similarly, under section 41 notice of an annual general meeting can be waived in writing and resolutions can be consented to in writing.

Future articles will focus on other ways to re-allocate expenses for strata corporations, including ways which require a $\frac{3}{4}$ vote resolution.

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