

Not in Your Backyard

Strata Corporation and Limited Common Property

Elaine McCormack

Many strata corporations are now in the process of reviewing and revising their bylaws to ensure that they are consistent with the Strata Property Act. Townhouse owners are often concerned about how other people in the complex use their backyards and whether the individual owner or the strata corporation should take care of the backyard. These issues can be addressed in the strata corporation's bylaws.

As most readers of the *CHOA News* will be aware, limited common property is owned by all owners but is for the exclusive use of the owners of one or more strata lots. It can be created in a variety of different ways. Often times, the owner developer ensures that a designation is made on the strata plan when it is deposited in the land title office. If a strata corporation wants to create limited common property later on it may do so by a resolution passed by a 3/4 vote at an annual or special general meeting. The resolution must then be filed in the land title office with a sketch plan that satisfies the registrar and that defines the areas of limited common property and specifies each strata lot whose owners are entitled to the exclusive use of the limited common property. There are also guidelines set out in the Strata Property Act explaining how the designation of limited common property can be removed. The method of removal depends upon how the designation was created.

One frequently asked question is "Can an owner put a hot tub, shed, or dog run in his backyard?" An owner may enjoy having a hot tub in his backyard, but other owners in the development may be concerned about whether children can gain access to the hot tub and the chemicals used in connection with it. Sheds and dog runs may be practical for an owner, but depending on the layout of the complex, a shed can block a neighbour's view of a park and a dog run may be visible from the next door neighbour's patio.

Strata corporations who want to maintain a uniform look to the limited common property should give some thought to what uses are not acceptable and pass a bylaw accordingly. It may be too late after the hot tub, shed or dog run is placed on the limited common property for the strata corporation to be able to require its removal.

For instance, in *Buchbinder v. Owners, Strata Plan VR 2096 (1992)*, 65 B.C.L.R. (2d) 325 an owner placed a garden shed on a patio that was limited common property. In that case a strata corporation had enacted a bylaw that read in part:

No visible changes to the building's exterior are permitted. These changes include but are not limited to the following: any change which requires approval from the City of Vancouver; changes to the colouring and/or finish of the building's exterior; any additions or deletions of a permanent or semi-permanent nature; enclosures of common and/or limited common property and awnings or canopies.

The British Columbia Court of Appeal found that the shed was not prohibited by the bylaw. In coming to this determination the Court commented that:

- the shed was free standing;
- it was not specifically prohibited by the bylaws;
- the patio was not incorporated within the definition of building exterior;
- the shed was not an addition; and
- it was not an enclosure of limited common property.

The Court refused to give a broad interpretation to the bylaw. The Court commented that giving a broad interpretation to the bylaw "...would make matters even more difficult for condominium owners trying to

interpret ambiguous and generalizing by-laws". If the strata corporation wanted to prohibit sheds, they needed a bylaw that specifically dealt with it.

In *Strata Plan NW243 v. Hansen* [1996] B.C.W.L.D. 2958 (B.C.S.C.) an owner had placed a hot tub in an area that was for his exclusive use. The strata corporation had a bylaw that prohibited an owner from altering the exterior appearance of the structure or doing anything, which would tend to increase the risk of fire or the rate of fire insurance premiums unless the prohibited act was approved by the corporation. The hot tub did not come within the definition of building exterior. There was no evidence of noise complaints or any increased insurance risk. After the hot tub was in place the strata corporation passed a bylaw prohibiting hot tubs. The Court found that the strata corporation could not retroactively prohibit the placement of a hot tub on common property, which was clearly designed for the exclusive use of one of the strata units.

When reading this article, it is important to keep in mind that your strata corporation likely has certain general bylaws concerning noise, nuisance and hazards that should allow the strata corporation to take effective action in circumstances where an owner's use of the limited common property is highly inappropriate.

As well as regulating what items can be placed on limited common property strata corporations can, under section 72 of the Strata Property Act, pass a bylaw making an owner responsible for the repair and maintenance of limited common property that the owner has a right to use. Care should be taken when passing such a bylaw that the strata corporation maintains control of those items that may impact the common property. For instance, if an owner is responsible to repair and maintain a balcony and he fails to do so, damage may result to the building exterior. If this happens an argument will undoubtedly ensue as to whether the problem originated with the balcony or the building exterior. As a result, it may be better for your strata corporation to be responsible to repair and maintain all balconies. However, both individual owners and the strata corporation may benefit from allowing the owners to care of their own backyards.

If your strata corporation is considering passing a bylaw about using and repairing limited common property, it is prudent to have a lawyer assist the strata council in drafting the bylaw so that it will have the desired effect.

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For more information contact: Elaine McCormack
Alexander Holburn Beaudin & Lang LLP
2700 – 700 West Georgia Street
Vancouver, B.C. V7Y 1B8

Ph: 604-484-1704
Fx: 604-484-9704
emccormack@ahbl.ca