Vancouver Island Strata Owners Association

The Rental of Strata Lots under the Strata Property Act

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Introduction

The renting of strata lots is one of the issues which seem to be of great importance to owners within strata corporations. It is often one of the first issues addressed by owners in a new strata corporation. It can also be one of the most controversial, with owners on both sides of the issue having strong feelings on the topic. It is also an issue that can be quite complicated.

What is a "Rental"?

Although the *Strata Property Act ("SPA")* refers to the rental of strata lots (sections 139 to 144) it does not actually define the term "rent". At times, this can be problematic; particularly when trying to apply rental restriction or prohibition bylaws to a situation which is not a traditional landlord/tenant relationship.

The *SPA* does define the word "tenant". It is defined as:

> "a person who rents all or part of a strata lot, and includes a subtenant but does not include a leasehold tenant in a leasehold strata plan as defined in section 199 or a tenant for life under a registered life estate;"

However, that definition too refers to the term "rent", bringing one back to the foundational issue; what does it mean to "rent" a strata lot?

The word "rent" is defined in the *Canadian Oxford Dictionary* as:

> "a payment made for the use of an asset and usually applied to physical assets such as property. Intangibles normally are licensed rather than rented".

Blacks Law Dictionary defines it as:

> "Consideration paid, usu. Periodically for the use or occupation of property."

The *Residential Tenancy Act* defines "rent" as:

> "…means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:
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> (a) a security deposit;
> (b) a pet damage deposit;
> (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees];"

From these definitions it is clear that in order to be renting a strata lot, there must be an exchange of consideration (usually money) in return for the right to reside in the premises. However, that does not make every relationship where there is an exchange of money a tenancy.

In *Strata Plan VR2213* v. *Duncan* 2010 BCPC 123 the issue before the court was whether a move-in fee was payable each time the occupancy of the strata lot changed. In *Duncan*, the strata lots were furnished and occupied by various people for short periods of time (i.e. a couple of weeks at a time). The strata corporation had no rental restriction bylaw, thus the activity itself was not the issue. What was in issue was whether the owner of the strata lot was required to submit a Form K and pay a move in fee every time someone came to stay in the unit. In other words, did each new occupancy result in a new tenancy? The owner argued that the people staying in the unit were there under a license agreement and not tenants. The court reviewed a number of cases from various jurisdictions and concluded in the end that there was no tenancy because "…the strata corporation has not proven that Unit 604 has been rented to an occupant pursuant to a lease agreement". It agreed that the nature of the arrangement was not one of landlord and tenant. Further, the court concluded that "the *Act* and the bylaws both contemplate occupiers who are not tenants". Non-owners are not automatically tenants. A Form K and move-in fee was not required to be submitted each time a person moved in because they were not tenants.

The decision in *Duncan* illustrates that it is the nature of the relationship between the parties (i.e. the owner and the person occupying the strata lot) which is determinative of whether there is a rental for the purposes of Sections 141 to 144 of the SPA. However, the exact nature of such a relationship can often be difficult to determine. The strata corporation is usually not privy to the details of the relationship between the owner and the person in the strata lot. How does it prove that an owner's "cousin" from out of town who is staying in the unit is paying money for the right to stay there?

While the strata corporation can ask these questions of an owner there is no obligation, absent a bylaw to that effect, for the owner to answer it. However, even then the answers provided may not be entirely truthful. In order to address this problem, strata corporations could consider enacting a bylaw which attempts to define what constitutes renting. For example, the strata corporation could include, as part of a rental restriction or prohibition bylaw, a provision that the occupancy of the strata lot by a person who is not an owner when the owner is not present in the strata lot, for more than a certain number of days, constitutes a rental of the strata lot. Such an amendment would capture those arrangements where the strata corporation suspects there to be a rental but cannot prove it. If such a bylaw is enacted, strata corporations should also give thought to what type of arrangements it may wish to allow (i.e. home exchanges, long term occupancy by a family member, etc.). Each strata corporation would need to determine what it is comfortable with.

Controlling Rentals

Absent a bylaw, owners are free to rent their strata lot to whomever and for however long they wish. However, Section 141 of the *SPA* permits the strata corporation to restrict those rights, but only in certain ways. (The ability to prohibit or limit rentals applies only to residential strata lots not non-residential strata lots).

Section 141(2) of the *SPA* permits a strata corporation to:

(a) Prohibit the rental of strata lots entirely; or
(b) Limit either:
    (i) The number or percentage of strata lots that may be rented; and
    (ii) The period of time for which they may be rented.

Where a strata corporation has been divided into sections pursuant to Part 11 of the SPA, each section can pass its own bylaw with respect to the rental of strata lots (provided the strata corporation does not have a bylaw dealing with the rental of strata lots). Such a bylaw would apply only to strata lots within that section.

Bylaws which prohibit the rental of strata lots entirely are relatively easy to draft. They simply need to contain a prohibition on the rental of strata lots. Nonetheless, the use of correct language is still important. Section 121 of the SPA prohibits a strata corporation from passing a bylaw which prohibits or restricts the right of an owner of a strata lot to "freely sell, lease, mortgage or otherwise dispose of the strata lot or an interest in the strata lot" except as permitted in the SPA.. A reference to strata lots having to be "owner occupied" would not necessarily be upheld as a prohibition on rentals and may even be contrary to Section 121. Bylaws which prohibit the "leasing" of strata lots are not ideal either. Since the *SPA* refers to the "rental" of strata lots it is best to track the language of the legislation in the bylaw; thereby avoiding any argument that the bylaw is enacted contrary to the *SPA*.

Preparing a bylaw which limits or restricts the number of strata lots that can be rented as well as the length of time for which they can be rented requires more attention to drafting. Firstly, the limitation is a quantitative one only. In *Cowe* v. *Strata Plan VR1349* (1994), 92 BCLR (2d) 327 the court held that a bylaw that prohibited an owner from leasing their strata lot until they had personally occupied it for a fixed period of time was contrary to the legislation and unenforceable. In *Mathews* v. *The Owners, Strata Plan VR90* 2016 BCCA 345 the court said that a bylaw which creates qualifications that must be met in order to be given permission to rent would be contrary to the SPA. Thus there cannot be any conditions (i.e. that the owner not be in arrears of their strata fees) which the owner must meet in order to be able to rent their strata lot pursuant to the terms of the bylaw.

Secondly, Section 141(3) of the *SPA* requires that where a bylaw sets out a limit on the number of strata lots that may be rented, that the bylaw must have a basic procedure to be followed in administering that limit. That procedure must be contained in the bylaw itself and cannot be a rule, a policy or an historic practice.

In *Carnahan* v. *Strata Plan LMS522* 2014 BCSC 2375 the court set aside a bylaw which limited the rental of strata lots to five (5) units because it did not have a process set out in the bylaw for determining how the strata corporation would administer that limit. The strata corporation's argument that it had administered the rental restriction for twenty years without complaint based on an informal process made no difference. As such, any bylaw which does not have a formula for administering the limit would be unenforceable.

In *Carnahan* the court gave some guidance with respect to what a rental restriction bylaw should contain, saying the following:

> [42] The *British Columbia Strata Property Practice Manual* suggests that procedural bylaws should address the following matters:
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> (a) Must the application to rent be in writing?
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> (b) What information must be included in the application to rent?
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> (c) Who receives applications to rent? Should applications be sent to the strata council or the strata management company?
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> (d) Within what time frame will the strata corporation respond to an application? Must the strata corporation's response be in writing?
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> (e) How much time does the owner have to find a tenant before permission to rent is revoked and another owner is given permission?
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> (f) If the limit has been reached, is there a waiting list? If so, what is the procedure for use of the waiting list?
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> (g) What is the penalty for renting a strata lot in contravention of a rental limit?
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> (L. Joy Tataryn, ed., *British Columbia Strata Property Practice Manual*, looseleaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2008) at §11.6.)
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> [43] To these, one could add the following:
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> (a) Is there a time limit on the rental period, or is it for an indeterminate period?

> (b) In what circumstances could the right of an owner to rent their strata lot be revoked? For example, when a renting owner sells, transfers, or takes occupancy of the strata lot? When a tenant vacates the strata lot? When a strata owner or tenant fails to comply with certain bylaws? When an owner fails to pay strata fees, and if so, in what circumstances?
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> [44] It is not necessary that a rental restriction procedure outline all of the abovementioned information to meet the requirements of s. 141(3). These are just possible examples. However, these are the kind of matters a strata corporation should consider when drafting rental restriction bylaws.

The list is not exhaustive nor must a bylaw contain everything set out therein.

In *Mathews* v. *The Owners, Strata Plan VR90* 2016 BCCA 345 the Court of Appeal concluded that the factors cited in *Carnahan* were not "minimum procedural requirements" but merely suggestions. It held that Section 141(3) did not require the strata corporation to set out in detail in the bylaw the substantive decision making criteria that will govern the determination of an owner's request to rent. Based on the language of Section 141(3) the Court of Appeal held that the section suggests that only a basic procedural framework was being contemplated. The absence of all the items discussed in *Carnahan* did not make the bylaw invalid. In fact, if too many factors are listed, the bylaw would begin to run afoul of Section 141(1) of the *SPA* which does not permit the screening of tenants. Interestingly, the court concluded that "…by default, adoption of a waitlist is practically speaking, the only permissible way of administering the limit that is open to a strata corporation…" A bylaw must, at a minimum, refer to the use of such a list. It need not contain any detail beyond that.

A bylaw which limits the number of strata lots that can be rented should address the following:

1. Identify the number of strata lots that may be rented;

2. Provide that an owner wishing to rent a strata lot must inquire with the strata corporation to see if there is space available;

3. Provide that if there is space available, the length of time within which that owner must rent the strata lot;

4. The use of a waitlist to establish priority for spots as they become available.

5. A stipulation as to when the right to rent comes to an end (i.e. when the tenant leaves or when the owner sells their strata lot);

6. The requirement to submit a Form K;

7. The ability to impose a fine of $500.00 every seven (7) days that a strata lot is rented in contravention of the bylaw.

Many strata corporations wish to enact a bylaw which sets a minimum length of time for which a strata lot can be rented. It is unclear whether such a restriction is permitted by Section 141(2). That section refers to placing a "limit" on the length of time that a strata lot can be rented. A "minimum" length of time is much different than a "limit". If a minimum were considered to be different than a limit, then such a bylaw would run afoul of Section 141(2) and be unenforceable. A minimum requirement is also of limited utility. An owner would be in compliance with the bylaw simply by entering into a tenancy agreement for that time. However, the tenant could leave before the end of the term. In that case, it would be difficult to fine the owner for being in breach of the bylaw.

When counting what strata lots fall within the allowed number of rentals under the rental bylaw there are certain rules to be followed. Section 142(4) of the *SPA* provides as follows:

> If the bylaws of a strata corporation include a bylaw referred to in Section 141 (2) (b) (i), a residential strata lot that has been rented
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> (a) to a member of the owner's family, or
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> (b) under an exemption from the bylaw granted or allowed under Section 144
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> is not to be considered, for the purposes of that bylaw, as a residential strata lot that has been rented.

In addition to this, any strata lot which is rented under the *Rental Disclosure Statement Exemption* pursuant to Section 143(2) of the *SPA* would also be excluded since no rental bylaw would apply to those strata lots.

The *SPA* also provides for a special class of fines which apply to the breach of rental prohibition or restriction bylaws. Under Regulation 7.1(2) the strata corporation can set a maximum fine of $500.00 for contravention of such a bylaw. In accordance with Section 132 and Regulation 7.1(3) of the *SPA*, that fine can be imposed every seven (7) days if the bylaws allow.

Strata corporations which allow rentals often wish to have some degree of control over the tenants that are placed in those units. However, that is not possible. Section 141(1) of the *SPA* provides as follows:

> 141 (1) The strata corporation must not screen tenants, establish screening criteria, require the approval of tenants, require the insertion of terms in tenancy agreements or otherwise restrict the rental of a strata lot except as provided in subsection (2).

From this section it is clear that a strata corporation cannot enact a bylaw which requires a landlord to rent to a certain type of tenant or that a tenant must meet certain criteria. Nor can it attempt to impose controls indirectly. Any bylaw that would require the owner to insert a term in the tenancy agreement to ensure compliance with the bylaws would run afoul of Section 141(1). For example, if a bylaw prohibited the subletting of strata lots, the owner would be required to insert a term in the tenancy agreement prohibiting subletting in order to comply with the bylaw. As a result, such a provision would be contrary to Section 141(1) of the *SPA*.

As a result of Section 141(1) of the SPA, a strata corporation has little say over who it has as tenants. It is left to owners to choose the type of tenant. That is not to say that the strata corporation has *no* control over the activities of tenants; something which we will discuss in detail below.

Should a strata corporation wish to enact a bylaw which either prohibits or limits the rental of strata lots, it needs to be aware of certain restrictions that pertain to its doing so. The first of those is found in Section 127(1) of the *SPA* which prohibits bylaws in general from being amended until the second Annual General Meeting (unless approved by a unanimous vote). In the case of a phased strata corporation, a rental restriction or prohibition bylaw cannot be passed until the Annual General Meeting following the deposit of the final phase of the strata corporation (or until an election not to proceed with the final phase has been made by the owner-developed). Where none of these restrictions apply, a rental restriction or prohibition bylaw may be passed.

Exemptions

Although a strata corporation can pass a bylaw which either prohibits or limits rentals, that bylaw will not necessarily apply to every owner. The *SPA* sets out four classes of owners who can be exempt from a rental prohibition or restriction bylaw. Those exemptions are:

1. The Rental Disclosure Statement Exemption;
2. Rental to a family member;
3. The hardship exemption; and
4. The current tenant exemption.

Rental Disclosure Exemption

Under Section 139 of the *SPA*, an owner-developer is permitted to file a Rental Disclosure Statement (“RDS”) which sets out the number of strata lots that are rented or for which the owner-developer reserves the right to rent in future. The RDS must set a date by which those rights expire. Pursuant to Regulation 17.14(1) an RDS filed under the *Condominium Act* is an RDS for the purposes of the *SPA*.

Many an RDS filed under the *Condominium Act* failed to set out a specific date by which the right to rent expires. Many used the term “indefinitely”. In *Abbas* v. *The Owners, Strata Plan LMS1921* 2000 BCSC 1930 the court held that the failure to include a specific date rendered such an RDS invalid. However, in *Spagnuolo* v. *Strata Plan BCS879* 2009 BCSC 1733 the court refused to follow *Abbas* and held that an RDS using the term “indefinitely” was valid.

Section 143(2) of the *SPA* provides an exemption from a rental restriction or prohibition bylaw based on the terms of the RDS. That section creates two classes of statements; those filed before January 1, 2010 and those filed after.

With respect to an RDS filed before January 1, 2010 the first purchaser from the owner-developer has the right to rent their strata lot until the date set out in the RDS. Where there is no date (i.e. the RDS refers to “indefinitely”) that right extends until the owner sells or transfers their strata lot. The right cannot be transferred to a subsequent owner. It is unclear whether the right continues where an original purchaser adds someone to title of the strata lot. Arguably it does because that original purchaser is still a co-owner and to prohibit rental of the strata lot simply because there is a new co-owner would deprive the first owner of the right granted to them under Section 143(2).

In the case of an RDS filed on January 1, 2010 or afterwards, a rental prohibition or restriction bylaw would not apply until the date set out in the RDS. In other words, the strata corporation remains a rental building until that date. It does not matter whether the owner of the strata lot is the original purchaser or the tenth purchaser; they have the right to rent pursuant to the terms of the RDS. Where an owner-developer has chosen a date well into the future, the owner-developer has effectively tied the hands of the strata corporation with respect to the control or prohibition of rentals. (It is possible under Section 139(2) of the *SPA* to amend a RDS but that requires the cooperation of the owner-developer as well as approval by way of a ¾ vote. If the owner-developer is a company that is no longer in business then that option is no longer available).

Family Member Exemption

The second exemption arises under Section 142 of the *SPA* and is with respect to “family” and “family members”. An owner is entitled to rent a strata lot to a family member notwithstanding the fact that the strata corporation otherwise prohibits or restricts rentals. However, the class of persons who fall within “family” is very narrow and is defined in Regulation 8.1 provides as follows:

> 8.1 (1) For the purposes of section 142 of the Act, "family" and "family member" mean:
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> (a) a spouse of the owner,
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> (b) a parent or child of the owner, or
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> (c) a parent or child of the spouse of the owner.

It is important to note that the relation is linear. It does not apply to siblings, nieces, nephews or cousins. Nor does it apply to grandchildren. Where an owner claims an exemption under Section 142 it is open to the strata corporation to require some form of proof of the relationship. That could be best achieved by way of a Statutory Declaration wherein the owner affirms under oath that the person renting the strata lot is their child, parent, or someone who falls within the scope of Regulation 8.1.

A strata lot rented under this exemption is not to be included in the number of rentals permitted under a rental restriction bylaw, even if there is room for strata lots to be rented pursuant to that bylaw.

Hardship Exemption

Section 144 of the *SPA* provides an exemption on the basis of hardship. In other words, an owner can apply to rent their strata lot on the basis that they would suffer a hardship if they were not able to rent the strata lot.

The *SPA*, however, does not define was constitutes a "hardship". In *Als* v. *Strata Corp NW1067* 2002 BCSC 134 the court defined "hardship" as "hardness of fate or circumstance; severe toil or suffering; extreme privation". It also noted that what might be hardship to one owner may not be hardship to another. Hardship therefore is dependent upon the facts of each case. There is no definitive list of factors which determines whether or not there is one.

In *Als* the court reviewed a number of previous decisions with respect to hardship. From that review and the decision itself, some guiding principles can be found:

1. An owner claiming a hardship must produce evidence of it.

2. A decrease in value or a loss on an investment is not a hardship unless it will ruin the owner financially.

3. The fact that the unit will sell for less than the value of the mortgage against it, is not a hardship unless the owner lacks funds or assets to cover the shortfall.

4. The owner must show a concerted effort to sell the unit at a price which will allow them to clear title.

5. Owners who choose to maintain 2 residences do not suffer a true hardship since they can eliminate the hardship by selling one.

6. The hardship does not have to be "undue". (Bylaws which attempt to set a stricter standard than the SPA are unenforceable)

7. Hardship can and will differ from owner to owner.

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More recently in *Sangha* v. *Strata K-6 Corp.* 2000 BCPC 150 the court said the following:

> [22] Quite frankly, I find the logic of the Strata Council to be sound - or, if not that, at least not unreasonable. For example, should a person be able to claim hardship if they decided to lease three Mercedes Benz automobiles at a monthly cost of $1,645.00? I think not. On the other hand, if a family was suddenly confronted with a shortfall in monthly finances due to loss of employment or a sudden illness of a child, matters over which they had little if any control, the situation would be quite different.

An owner requesting hardship must be prepared to provide information about their life and their finances. To put it bluntly, they must be prepared to "put all the cards on the table". Where an owner will not do so, then the strata corporation has grounds to refuse the request. Owners requesting permission to rent on the basis of hardship should be prepared to provide the following documents for them and their spouse:

- Income tax returns;
- Bank statements;
- Investment statements;
- Information regarding loan balances, including any mortgage(s);
- Assessments regarding land they own, including the strata lot;
- A list of assets and liabilities; and
- A statement of income and expenses.

The strata council must remember its obligations under the *Personal Information Protection Act* ("PIPA") to closely guard that information. It should not go beyond the strata council, the strata manager and legal counsel. Under the PIPA Guidelines, reference to the particular strata lot should not be made in the minutes when discussing hardship.

Strata councils often retain a lawyer to assist them with reviewing the materials submitted by the owner. While that is acceptable, it is the strata council that must, at the end of the day, make the decision. Neither the strata manager nor the lawyer can decide whether or not a hardship exists and an exemption should be granted. They can provide advice or guidance but the decision must be that of council.

Section 144 also sets strict timelines for dealing with an owner's request for an exemption. If an owner, as part of their exemption request, asks for a hearing before council that hearing must be held within four (4) weeks of the date of the request. A response must be given within one (1) week of the hearing. Where an owner does not request a hearing, the strata corporation must respond within two (2) weeks of the owner's request. In both cases, the response must be in writing. Where the strata

corporation fails to meet the deadlines under section 144(4) the exemption is automatically granted.

It is critical that the strata corporation adhere to these timelines. In *The Owners, Strata Corporation LMS3442* v. *Storozuk* 2014 BCSC 1507, the court allowed Mr. Storozuk the right to rent on the basis of hardship because the strata corporation failed to comply with Section 141(4) of the *SPA*. Although Mr. Storozuk had been told at the hearing before council that his hardship request was rejected, that did not meet the requirements of Section 144 (4) which requires that the decision be in writing. To make matters worse, the strata corporation *did* respond in writing to Mr. Storozuk but eight (8) days after the hearing. It had missed, by one day, the one week deadline.

It is unclear from Section 144 as to whether the owner must be in receipt of the response within the seven (7) days or simply whether it must have been sent to them within that time frame. Section 61(3) of the *SPA* provides that notice, if placed under a strata lot door, mailed or e-mailed to an owner, is deemed to be delivered four (4) days later. If the owner must be in receipt of the notice before the end of the seven (7) day period, that would require it to be delivered no later than three (3) days after the hearing. That is hopefully not the correct interpretation as it is otherwise unworkable. (The court in *Storozuk* did not address that requirement).

Section 144(5) permits the strata corporation to restrict the length of time for which a strata lot can be rented on the basis of hardship. (Even if the deadline to respond is missed and the exemption automatically granted, it is arguable that the strata corporation still retains this power). Strata corporations should give careful thought to the length of time the owner will be allowed to rent. It should be long enough so that good tenants can be found. It should also be long enough to allow the owner a chance to resolve the hardship. In other words, if a short period is granted and the hardship still exists at the end of that period, it is arguable that the owner would be entitled to a further exemption. It is incumbent on an owner to whom an exemption has been granted to take steps to relive themselves of the hardship during the rental period. While the strata corporation cannot set conditions for the approval of hardship, it can certainly emphasize what its expectations of the owner are.

Current Tenant Exemption

The final exemption is found in Section 143(1) and provides as follows:

> (1) Subject to subsection (4), a bylaw that prohibits or limits rentals does not apply to a strata lot until the later of
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> (a) one year after a tenant who is occupying the strata lot at the time the bylaw is passed ceases to occupy it as a tenant, and
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> (b) one year after the bylaw is passed.

This section is simply a delaying provision to protect owners who are renting from having to evict their tenant and be faced with fines if they don't.

Simply because the strata corporation passes a rental prohibition or restriction bylaw does not terminate the tenancy relationship between landlord and tenant (nor does it permit the landlord to end the tenancy). As a result of this provision, a rental prohibition or restriction bylaw may not have an immediate effect. An owner who decides to rent pursuant to the exemption must ensure that their tenancy agreement terminates on the date that the right to rent terminates. Should the tenant stay on, the strata corporation would be entitled to fine that owner.

Dealing With Tenants

Almost every strata corporation requires the owner to submit a Form K Notice of Tenants Responsibility; a document prescribed under the regulations to the *SPA* wherein the strata corporation is notified that the strata lot is being rented, and is notified of the names of the tenants and that the tenants have received the bylaws of the strata corporation. However, the requirement to submit a Form K arises not under the bylaws of the strata corporation but under section 146 of the *SPA*. Strata corporations should therefore include in their bylaws a requirement that an owner who is renting a strata lot (whether permitted under the bylaws or pursuant to an exemption) submit a Form K. That way the strata corporation has the ability to impose a fine for the failure to do so. Absent a bylaw there is no provision to fine an owner for a breach of the *SPA* itself.

It should also be kept in mind that the decision in *Duncan* (discussed above) established that a Form K is only required where there is a true tenancy. If there is simply an "occupancy" of a strata lot (whether under license or otherwise) there is not requirement for the owner to submit the Form K.

In addition to the information required under the Form K, Standard Bylaw 4(2) requires a tenant to inform the strata corporation of their name upon request. That bylaw can be amended to require the owner to provide that information upon renting the strata lot. It can also be expanded to require additional information such as telephone number, email address, information about vehicles etc.

One concern that owners often have is that tenants will be less responsible members of the strata community. At times that is true and at times it is not. It is important to note that tenants are required by the *SPA* to comply with the bylaws. In that regard, the ability to control a tenant is no different than the ability to control an owner. Section 130(2) of the *SPA* permits the strata corporation to fine a tenant if the tenant, a person residing in their strata lot or someone permitted by them into the strata corporation breaches a bylaw or rule. In the same vein, Section 135 of the *SPA* requires the strata corporation to deal directly with the tenant where the tenant has breached the bylaw. Many strata corporations make the mistake of writing only to the owner. That can result in any fines imposed being set aside.

Owners ultimately remain responsible for the conduct of their tenants. Section 131 of the *SPA* holds them liable for any fines imposed and costs of remedying a bylaw contravention imposed against the tenant. In *Strata Corp LMS2723* v. *Morrison* 2012 BCPC 300 the court held an owner liable to pay the strata corporation an insurance deductible which resulted from the actions of a tenant. When dealing with a troublesome tenant it is important to point out to the owner their ultimate liability for the actions of the tenant. If the owner fails to control their tenant, they could be liable for thousands of dollars in fines and legal fees.

The *SPA* provides the strata corporation with a unique power to evict a tenant (one it doesn't have in relation to an owner). That power is found in section 138 of the *SPA* which provides as follows:

> 138 (1) A repeated or continuing contravention of a reasonable and significant bylaw or rule by a tenant of a residential strata lot that seriously interferes with another person's use and enjoyment of a strata lot, the common property or the common assets is an event that allows the strata corporation to give the tenant a notice terminating the tenancy agreement under section 47 [landlord's notice: cause] of the Residential Tenancy Act.
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> (2) An eviction under subsection (1) does not affect any rights of the landlord under the tenancy agreement.

However, there are restrictions with respect to that power. It can only be exercised where:

1. The actions of the tenant are a repeated or continuing contravention of a bylaw;

2. Where the bylaw contravened is reasonable and significant; and

3. Where the actions of the tenant seriously interfere with another persons use and enjoyment of a strata lot or the common property;

A single act of a tenant, no matter how serious, will not give the strata corporation grounds for eviction. Nor will the daily breach of a rule which does not impact anyone else. Strata corporations need to be careful in exercising this power. Should they wrongly evict a tenant and the owner lose revenue, the strata corporation could be liable for that lost revenue.

A notice given under Section 138 is not easily enforced, however. The Residential Tenancy Branch routinely refuses to enforce notices issued under Section 138 because the strata corporation is not the "landlord". That leaves the strata corporation with having to go to the British Columbia Supreme Court pursuant to Section 173(1) of the *SPA* to obtain an order evicting the tenant. Now with the introduction of Civil Resolution

Tribunal it is possible to apply for enforcement there. Sometimes merely issuing the notice will have its intended effect.

Assignment of Rights to a Tenant

Under the SPA it is possible for an owner to assign their rights as an owner to their tenant (beyond the rights associated with a proxy, which are limited to a meeting).. They can do so under Section 147 of the SPA so long as that assignment is in writing and delivered to the strata corporation. Where that happens the tenant steps into the shoes of the owner to the extent the assignment allows.

However, that same assignment of rights can happen automatically under Sections 142 and 148 of the SPA.

Section 142(3) of the SPA provides that:

> "A rental of a strata lot to a family member under this section creates an assignment of the owner's powers and duties under section 148".

Section 148 provides:

> 148 (1) In this section, **"long term lease"** means a lease to the same person for a set term of 3 years or more.
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> (2) If a residential strata lot is leased under a long term lease, the tenant is assigned the powers and duties of the landlord under this Act, the bylaws and the rules for the term of the lease.
>
> (3) Before exercising any powers of the landlord, the tenant must have given to the strata corporation written notice of the assignment referred to in subsection (2), stating the name of the tenant and the time period during which the lease is effective.
>
> (4) The strata corporation must give a copy of the notice referred to in subsection (3) to the landlord and to the owner.
>
> (5) The assignment does not include an assignment of the landlord's responsibility under section 131 for fines or the costs of remedying a contravention of the bylaws or rules.
>
> (6) The tenant must not, without the owner's consent, exercise any power or right of an owner
>
> (a) to acquire or dispose of land,

> (b) to cancel or amend the strata plan, or
>
> (c) to do anything that would affect the owner's interest in the strata lot, common property or land that is a common asset.
>
> (7) The landlord must not deal with his or her interest in the strata lot, common property or land that is a common asset in a way that unreasonably interferes with the rights of the tenant under the lease or assignment.

In the context of a rental to a family member, the tenancy need not be 3 years or longer for the provisions of Section 148 to apply. The tenancy can be of any length.

The effect of renting a strata lot to a family member or entering into a lease for more than 3 years can be significant and quite unexpected. Unlike the assignment referred to in Section 147 of the SPA, the assignment in this case is automatic. In other words, as soon as the owner rents the strata lot to their family member they lose a number of the rights associated with ownership, most notably the right to attend general meetings and vote. A parent who buys a strata lot to rent to their child while they attend university or a child who rents a strata lot to their aging parent can unwittingly find themselves in a situation where they no longer have full control over their investment and no say in the management of the strata corporation.

Although Section 148(3) of the SPA requires the tenant to notify the strata corporation in writing that he or she intends to exercise the rights of the owner before doing so, the owner’s loss of their rights is not dependant on the tenant issuing such notice. The assignment is automatic and dependant only on the existence of the tenancy. In other words, if the tenant never exercises their rights under Section 148 then conceivably no one can cast a vote on behalf of the strata lot.

Owners who rent to family members or enter into a lease for more than 3 years not only loose their powers in relation to the strata lot, but are also relieved (to some extent at least) of their obligations in relation to it as well. Given that the assignment is in relation both to the owner’s powers *and duties,* the obligation to pay strata fees become the responsibility of the tenant. It is they who should be fined for the failure to pay; not the owner. (The owner, however, remains ultimately liable in the sense that it is their strata lot which would be sold to satisfy the arrears).

Family members and long term tenants who are renting a strata lot are also eligible to be elected to the strata council. Section 8(1)(c) of the SPA includes “tenants who, under

section 147 or 148, have been assigned a landlord's right to stand for council" as part of the list of those persons who can be elected.

What does all this mean then for strata corporations? First of all, they must pay careful attention where a family member is living in a strata lot without the owner living there. They must establish whether or not a tenancy exists. If one does, then a Form K must be submitted. Once that occurs the strata corporation must now start dealing with the tenant (except where the SPA specifically requires the strata corporation to continue dealing with the owner) as if they were an owner. For example, notices of meetings must also be sent to the tenant. Tenants can request documents under Section 36 of the SPA.

The strata corporation must also ensure that the owner is not permitted to vote at a general meeting unless they have a proxy from the tenant (which proxy can only be issued once the tenant has given notice as per Section 148(3) of their intention to exercise the powers of the owner). The tenant can vote only if they have given written notice of their intention to exercise the right to do so.

Lastly, the strata corporation must note when the tenancy comes to an end and revert back to its normal practices.

Tenant's Rights

Tenants have been given specific rights under the SPA. For example:

- They can request a hearing before council (s.34.1 of the SPA);
- They can attend meetings as observers (Standard Bylaw 26(1));
- They can seek relief against the strata corporation under Sections 164 and 165 of the SPA);
- They have the benefit of the strata corporation's insurance (Section 155 of the SPA);
- They must get notice of any alleged bylaw contravention and be given a right to respond (Section 135 of the SPA);

Short Term Rentals

An increasingly common issue being faced by strata corporations is the use of strata lots for short term or vacation accommodation (i.e. Air BnB). Many strata corporations do not like the prospect of strata lots being used for such a purpose. Given the decision in *Duncan*, strata corporations cannot rely on rental prohibition bylaws to deal with arrangements of this nature. They arguably do not constitute a tenancy and therefore

do not constitute the rental of a strata lot. Strata corporations wishing to address this issue will need to pass a bylaw specifically prohibiting the use of a strata lot for such purposes.

When preparing such a bylaw, a strata corporation will need to consider what activities it intends to prohibit.

- Are home exchange programs okay?
- What about having an exchange student live with you?
- What if the owner is present in the strata lot and simply rents out a room?
- Will it apply only to activities for which consideration is exchanged or will it apply to any occupancy wherein the owner is not present?
- Will an owner be allowed a certain number of days each year that they can have a third party stay in their strata lot?

The broader the list of prohibited activities the better the enforceability of the bylaws. However, the wider the net is cast the more things it captures. It may end up prohibiting activities which the owners would otherwise want to allow.

As municipalities begin to address this issue, the importance of the strata corporations' bylaw may begin to decrease. Standard Bylaw 3(1)(d) prohibits using a strata lot in a way that is "illegal". This would include in a manner which is contrary to the bylaws of a municipality.

Should a strata corporation wish to allow such arrangements it will need to give thought to how to regulate them.

- Will a certain number be allowed?
- What information will the strata corporation require about the individuals?
- How will fob access be dealt with?
- Will guests be permitted to use recreational facilities? Under what conditions?
- How will visitor parking be regulated?

Strata corporations are arguably not allowed to charge a fee for the use of a strata lot as short term accommodation. While Section 110 of the *SPA* permits the strata corporation to impose user fees for the use of the common property, Regulation 6.9 requires any such fee to be reasonable and to be set out in a bylaw or in a rule. In *The Owners, Strata Plan LMS 3883* v. *De Vuyst* 2011 BCSC 1252, the court upheld an arbitrator's decision striking down a move in fee because the fee did not relate to actual expenses incurred by the strata corporation as a result of the move into the building. Based on that decision, if the strata corporation were to impose a user fee on short term accommodation arrangements it would need to be able to substantiate that it incurred

additional costs with respect to the use of the common property. It cannot be used as an opportunity to create a source of revenue.

Conclusion

The regulation of the rental of strata lots can be a difficult area to navigate. However, with the proper knowledge, advice and guidance strata corporations and owners can make informed decisions both with respect to establishing bylaws and enforcing them.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shown M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for VISOA. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com.