

Vancouver Island Strata Owners Association

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**ALTERATIONS:
EVERYTHING YOU EVER
WANTED TO KNOW.**

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Introduction

Dealing with alterations (both in the form of requests for permission and unauthorized alterations) is one of the tasks which strata councils deal with most frequently. That fact is evidenced by the number of decisions released by the *Civil Resolution Tribunal* (CRT) relating to alterations. It is an area that is often difficult to deal with and fraught with potential problems. This paper will hopefully provide some guidance to strata councils when dealing with such issues.

Understanding the Strata Plan

In order to properly understand and apply bylaws regarding alterations, repair and maintenance, and insurance one must understand how to correctly interpret a strata plan. In all three cases much turns on the designation of a particular area.

Strata plans come in two types; conventional and bare land. A conventional strata plan will show buildings (whether they be apartments, townhomes or detached homes) whereas a bare land strata plan will not.

Strata plans are divided into two, and often three, different types of areas; strata lots, common property and limited common property. Each is defined by s.1 of the *Strata Property Act* (SPA).

"strata lot" means a lot shown on a strata plan;

"common property" means

(a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and

(b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located

(i) within a floor, wall or ceiling that forms a boundary

- (A) between a strata lot and another strata lot,
 - (B) between a strata lot and the common property, or
 - (C) between a strata lot or common property and another parcel of land, or
- (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;

"limited common property" means common property designated for the exclusive use of the owners of one or more strata lots;

Generally speaking, strata plans depict these areas horizontally. However, some strata plans will show vertical cross-sections. These often depict attic and roof areas and will usually show them as common property. However, certain types of common property (i.e. pipes, wires, ducts, etc.) are not shown on the strata plan. They are defined by their physical location (i.e. within in a boundary wall).

Strata plans will show the boundaries of each strata lot but not internal walls or rooms. Some internal areas such as garages are delineated since they are not included in the calculation of the habitable area of the strata lot. Balconies are usually shown and are generally limited common property. However, in older buildings balconies are sometimes common property and, on the odd occasion, part of the strata lot itself. Areas external to the building such as patios, decks, yards and garage aprons are only delineated if they are limited common property. Parking stalls too are delineated only if they are designated as limited common property.

The boundary between a strata lot and the common property is established by s.68 of the SPA which provides:

- (1) Unless otherwise shown on the strata plan, if a strata lot is separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is midway between the surface of the structural portion of the wall, floor or ceiling that faces the strata lot and the surface of the structural portion of the wall, floor or

ceiling that faces the other strata lot, the common property or the other parcel of land.

- (2) If a strata lot is not separated from another strata lot, the common property or another parcel of land by a wall, floor or ceiling, the boundary of the strata lot is as shown on the strata plan.
- (3) A boundary shown on the strata plan must be shown in a manner approved by the registrar.
- (4) Despite subsections (1) to (3), but subject to the regulations, in the case of a bare land strata plan, the boundaries must be shown on the strata plan
 - (a) by reference to survey markers, and
 - (b) in compliance with rules, if any, made under section 75 of the [Land Surveyors Act](#) for the purposes of this section.

It is important to note the exception; “unless otherwise shown on the strata plan”. Plans which include “detached home” strata lots will often define the boundary as the exterior of the outside wall. That can have a significant impact on how repair and maintenance responsibilities are interpreted. It can also make a difference when it comes to alterations. Bylaws pertaining to common property will not apply.

Limited common property can be shown on the strata plan, but it can also be designated through a $\frac{3}{4}$ vote resolution under s.74 of the SPA. Such a resolution does not amend the strata plan. As such, the resolution appears as a notation on the Common Property Record and must be accompanied by a sketch plan showing the dimensions of the area so designated.

One exception to the rule that limited common property must appear on a plan arises out of the decision in *Louie v. Strata Plan VR-1323* (2015), 55 C.C.L.I. (5th) 217. In that case the court held that ducting located in a ceiling, but which serviced only one strata lot, was limited common property. However, in reaching that conclusion the court did not appear to consider the process laid out in ss. 74 and 75 of the SPA for designating limited common property. In both cases the limited common property must appear on a plan capable of being filed in the Land Title Office.

A similar decision was reached in *Okranietz v. Owners of Condominium Plan No. 82R 49* (1992), 24 RPR (2d) 293 (which was cited with approval in *Elhai v. Strata Plan VR1023* 2011 BCSC 1665) where the Court of Queen's Bench in Saskatchewan held that air conditioning units which serviced only one strata lot, but were installed on the common property, were the owner's property and their responsibility to repair and maintain. However, the CRT has taken a different view. In both, *Newman v. The Owners, Strata Plan EPS680* 2017 BCCRT 122 and *Warren v. The Owners, Strata Plan VIS6261* 2017 BCCRT 139 the CRT held that heat pumps, even when they service only individual strata lots, are common property because they are attached to the common property.

Alterations – the Standard Bylaws

S.120 of the SPA provides that the “bylaws of the strata corporation are the Standard Bylaws except to the extent that different bylaws are filed in the Land Title Office”. Thus every strata corporation begins with the Standard Bylaws and those remain in effect until amended or replaced.

Standard Bylaw 5 applies to situations where an owner wished to alter a strata lot.

Obtain approval before altering a strata lot

- 5** (1) An owner must obtain the written approval of the strata corporation before making an alteration to a strata lot that involves any of the following:
 - (a) the structure of a building;
 - (b) the exterior of a building;
 - (c) chimneys, stairs, balconies or other things attached to the exterior of a building;
 - (d) doors, windows or skylights on the exterior of a building, or that front on the common property;
 - (e) fences, railings or similar structures that enclose a patio, balcony or yard;
 - (f) common property located within the boundaries of a strata lot;

(g) those parts of the strata lot which the strata corporation must insure under section 149 of the Act.

(2) The strata corporation must not unreasonably withhold its approval under subsection (1), but may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

(3) This section does not apply to a strata lot in a bare land strata plan.

What catches many by surprise (or is often simply over looked) is the reference to s.149 of the SPA in subparagraph (g). Under s.149 the strata corporation is required to insure:

- (a) buildings shown on the strata plan, and
- (b) 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.

The term “fixtures” is defined in Regulation 9.1 to include “items attached to a building, including floor and wall coverings and electrical and plumbing fixtures, but does not include, if they can be removed without damage to the building, refrigerators, stoves, dishwashers, microwaves, washers, dryers or other items”

By reference to s.149, Standard Bylaw 5 applies to items such as flooring, bathtubs, showers, cabinets, fireplaces, and interior railings (this list is by no means exhaustive). Light fixtures would arguably be excluded as they can be removed without damage.

Standard Bylaw 5 also applies to consequential changes to the common property which arise out of changes to the strata lot; even if the changes themselves would not be caught by the bylaw.

Standard Bylaw 6 applies to common and limited common property. It provides:

Obtain approval before altering common property

- 6** (1) An owner must obtain the written approval of the strata corporation before making an alteration to common property, including limited common property, or common assets.

- (2) The strata corporation may require as a condition of its approval that the owner agree, in writing, to take responsibility for any expenses relating to the alteration.

A key difference between Standard Bylaws 5 and 6 is that approval under Standard Bylaw 5 cannot be unreasonably withheld. In other words, if the strata council is to deny the request it must have a reasoned basis for doing so. That reason should be rational and should be recorded in the minutes. A request to alter common property which is not associated with an alteration to a strata lot can be denied without reason.

Where the proposed alteration relates to work necessary for repair and maintenance, there is little room to refuse the request – *Anthony v. Schnapp* 2016 BCSC 1839

What is an “Alteration”?

The term “alteration” was first given judicial consideration by the Ontario Superior Court of Justice in *Wentworth Condominium Corporation 198 v. McMahon* 2009 CarswellOnt. 1273. That particular case dealt with the installation of a hot tub in the backyard of a townhome. The hot tub was simply placed on the patio and connected to the building by way of an electrical cable. The issue before the court was whether the placement of the hot tub was an “addition, alteration or improvement” that would require approval of the condominium corporation’s board pursuant to s. 98 of the Ontario *Condominium Act*. In making its decision the court considered what each of those three words meant, stating:

22. Therefore, I find that the word “addition” means something that is joined or connected to a structure, and the word “alteration” means something that changes the structure.
23. I find that the word “improvement” means the betterment of the property or enhancement of the value of the property. I also accept that an “improvement” refers to an improvement or betterment *of the property*. That is, to be an improvement there must be an increase in the value of the property. If the item increases the enjoyment of the property, but does not increase the value of the property, I find that the item is not an improvement.

In the end, the court concluded that placement of the hot tub on the common property did not constitute an addition, alteration or improvement since it did none of the things those words encompass. (A similar decision was reached by the British Columbia Supreme Court in *The Owners, Strata Plan LMS4255 v. Newell* 2012 BCSC 1542 with

respect to hot tubs not being an alteration under Standard Bylaw 6. However, there was no analysis of the term “alteration” undertaken).

The decision in *Wentworth* has been applied in British Columbia with somewhat differing results. The first time it was applied was in *The Owners, Strata Plan NWS254 v. Hall* 2016 BCSC 2363. In that particular case, Mr. Hall proceeded to replace four windows and a patio door which the strata corporation had refused to repair. He then proceeded to sue the strata corporation for the cost of doing so. (As an aside, the court held that the windows and doors were in such poor condition that they needed to be replaced as opposed to repaired and awarded Mr. Hall the costs he expended in doing so – a rare instance in which a self-help remedy was sanctioned by the court). In defence, the strata corporation argued that Mr. Hall should not be entitled to any compensation because he had not obtained the permission of the strata corporation to alter the common property as required by Standard Bylaws 5(1) and 6(1). In rejecting that argument the court applied the decision in *Wentworth* and concluded:

[41] Here, the work involved the removal and replacement of four windows and the patio door. The replacement of the windows and door did not change the structure of the respondents unit, or the common property. I conclude that the replacement of the four windows and the patio door was not an “alteration” within the meaning of ss.5(1) or 6(1) of the Standard Bylaws requiring the prior approval in writing of the Strata Corporation.

What becomes evident from the decision in *Hall* is that under the Standard Bylaws an owner does not need permission to change something that already exists, so long as it is “like for like.”

In *Allwest International Equipment Sales Co. v. The Owners, Strata Plan LMS4581* 2017 BCSC 1646 the court also applied the definition from *Wentworth*, holding that drilling a 2 inch hole for a pipe in an exterior wall was an alteration because it changed the structure (i.e. the building). The decision was upheld on appeal, with the court noting that there must be a materiality component to the change in order for there to be an “alteration”. Whether something is a material change will depend on the circumstances of each case. However, the bar for determining whether something is material was set quite low by recognizing the cutting of a 2nd hole as a change.

Although the decision in *Allwest* dealt with changes to the common property, it has far reaching implications for interior work as well. Section 149 and Regulation 9.1 of the SPA (to which Standard Bylaw 5(1)(g) refers) include within their scope: “items attached to a building, including floor and wall coverings and electrical and plumbing

fixtures”. Almost anything that is not a routine repair would be caught. Strata corporations may wish to eliminate or narrow Standard Bylaw 5(1)(g), perhaps limiting it to flooring, cabinets and bathroom fixtures.

Some examples of more minor things being considered “alterations” are:

- *Wilchek v. The Owners, Strata Plan VR 55*, 2017 BCCRT 67 - Plumbing work was held to fall within the scope of Bylaw 6 since the pipes to which the work was done fell within the definition of common property (although the definition was broadly applied to include connected systems).
- *Friedrich v. The Owners, Strata Plan K515*, 2018 BCCRT 184 - the CRT held that painting exterior French doors a different colour was an “alteration”.
- *Parnell v. The Owners, Strata Plan VR 2451*, 2018 BCCRT 7 the installation of doorbell cameras and video surveillance cameras were considered alterations.
- *Boyer v. Downey et al*, 2018 BCCRT 156 the drilling of lag bolts into joists to support a medical lift system was held to be an alteration because of the impact on the strength of the joists.

Strata corporations should consider revising their bylaws pertaining to alterations to suit the degree of control owners wish the strata council to have over alterations; particularly work done within a strata lot. Broader or narrower wording than that used by the Standard Bylaw may be required.

It is important therefore to recognize the limitations of Standard Bylaw 6 when it comes to changes to yard areas. Not everything that is done will constitute an alteration (or even an addition or improvement). Much will turn on how the item is constructed or placed. For example, a free standing deck, resting on pier blocks, would likely not be considered an alteration. However, if the supporting posts were cemented into the ground, it probably would be. In *Zhang v. The Owners, Strata Plan BCS1115* 2017 BCCRT 79 a bylaw which referred to “making an alteration or addition or doing a renovation or other work” was broad enough to capture the construction of an arbour in a back yard.

Contrary to the decision in *Newwell*, in *Giddings et al v. The Owners, Strata Plan BCS 3620*, 2018 BCCRT 61 the CRT determined that the erection of a gazebo-type structure on a patio was an alteration. Its size and permanency seems to have swayed the tribunal to that view. There was no discussion, however, of *Wentworth* or *Newell* so the decision could be readily distinguished.

The planting of trees and bushes is likely to be considered an alteration to the common property as was the case in *Wu v. Hu and The Owners, Strata Plan BCS 3579*, 2017 BCCRT 81. Improvement on a large scale can be considered alterations as well. In *Anthony, supra* the court held that the planting of 6 trees, the placement of 4 large vegetable boxes, the removal of a hedge and its replacement with a fence, the construction of patio and the installation of drainage were alterations for which permission was required. However, minor plantings (i.e. one or two small plants) might not meet the materiality test requirement mentioned in *Allwest* above. It is interesting to note that in *Fenby v. Strata Plan NW 228*, 2002 BCSC 936 the placement of paving stones was held to be an interference with the use of the common property.

When drafting bylaws, using the correct wording is important, as the cases below illustrate:

- *Harvey, et al v. The Owners, Strata Plan NW 2489* 2003 BCSC 1316 - the use of the term “structural alteration” was determined to capture things “along the lines of knocking out a load bearing wall, constructing an additional room or fundamentally reconfiguring the dimensions of an existing space.” As such, the removal of the carpeting and accompanying underlay and the installation of the new underpad and wood flooring was not captured by the bylaw.
- *Buchbinder v. Owners, Strata Plan VR2096* [1992] 12 BCAC 132 – the bylaws prohibited changes to the “building exterior”. That was not considered broad enough to prohibit erecting a garden shed on a patio. The court held that the patio was not part of the building’s exterior.
- *Zhang v. The Owners, Strata Plan BCS1115* 2017 BCCRT 79 - a bylaw which referred to “making an alteration or addition or doing a renovation or other work” was broad enough to capture the construction of an arbour in a back yard.
- *Friedrich v. The Owners, Strata Plan K515*, 2018 BCCRT 184 - the bylaws provided that “...no installations on common property shall be undertaken without Strata Council permission. This includes the removal or planting of trees, flower gardens, etc”. This was enough to capture landscape work done to a rear yard.

Bare land strata corporations which have only the Standard Bylaws have no restrictions (other than those imposed by municipal or regional bylaws) on what an owner can build or place on their strata lot. Bylaw 5(3) expressly excludes Bylaw 5 from applying to strata lots in a bare land strata corporation. As such, those strata corporations have no control over what is constructed or placed on a strata lot. As such, they may wish to add

to their bylaws a building scheme and a corresponding approval process. That bylaw could address things such as:

- what type of structures are permitted;
- what the structures may look like;
- how far back structures should be set;
- what size and style decks should be;
- where fences can be located and how tall they might be;

Some bare land strata corporations might already have such schemes registered against the strata lots as a charge on title. Where that is the case, the strata corporation cannot, by way of a bylaw, make the conditions stricter than those in the registered scheme - *Winchester Resorts Inc. v. Strata Plan KAS2188* (2002), 4 B.C.L.R. (4th) 390.

The application of Standard Bylaw 5 to commercial strata lots (referred to in the SPA as “non-residential”) is also somewhat limited. Most commercial strata lots are not finished by the owner-developer. They are simply left as an empty shell. As a result, there is no requirement to insure the fixtures under s.149 and Bylaw 5(1)(g) arguably does not apply. Commercial strata lot owners and tenants could install tenant improvements without needing the approval of the strata corporation. The oversight and control of commercial strata lot alterations may be all the more critical depending on the intended use of the strata lot(s).

Special kinds of alterations

Alterations which change the habitable area of a strata lot require special attention and approval.

“Habitable area” is used to determine each strata lot’s unit entitlement which in turn determines its share of the common expenses. “Habitable area” is defined as “the area of a residential strata lot which can be lived in, but does not include patios, balconies, garages, parking stalls or storage areas other than closet space.”

Those portions of the strata lot (most often the garage) which are not considered habitable area are identified on the strata plan.

Where an owner wants to convert a non-habitable portion of their strata lot to habitable area, s.70(4) of the SPA applies in addition to the bylaws. It provides:

Subject to the regulations, if an owner wishes to increase or decrease the habitable part of the area of a residential strata lot, by making a nonhabitable part of the strata lot habitable or by making a habitable part of the strata lot nonhabitable, and the unit entitlement of the strata lot is calculated on the basis of habitable area in accordance with section 246 (3) (a) (i) or on the basis of square footage in accordance with section 1 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the owner must:

- (a) seek an amendment to the Schedule of Unit Entitlement under section 261, and
- (b) obtain the unanimous vote referred to in section 261 before making the change.

Regulation 5.1(2) exempts an owner from the unanimous vote requirement where the increase to the habitable area, combined with any previous increase to the habitable area, is less than 10% of the habitable area of the strata lot and less than 20 square metres. The prior written approval of the strata corporation, as set out in the bylaws, is still required.

A common example of where s.70(4) applies is to the conversion of garages into living space. The building of a dividing wall and putting carpet down will be enough to trigger a change from non-habitable to habitable. If the area is larger than 20 square metres, the approval of all the other owners is required. Such conversions often violate covenants registered against title by the local government. Those covenants usually require there to be at least two indoor parking spaces. Enclosing all or part of the garage violates that requirement and constitutes a breach of Standard Bylaw 3(1)(d), which prohibits use of a strata lot in way that is illegal.

Enclosing common or limited common property (i.e. a balcony) does not trigger a change in the unit entitlement since unit entitlement is based on the habitable area of the *strata lot*. Changing the way in which common property is used by enclosing it does not change its nature; it is still common property.

Decreasing the habitable area does not require a unanimous vote since it will not affect the unit entitlement. The area that was previously habitable, will remain so for the purposes of unit entitlement.

Removing the wall between two strata lots (or putting it back) is governed by ss.70(1) and (2) of the SPA. Permission of the strata corporation must be sought, but cannot be refused so long as the work complies with:

- (i) a building regulation within the meaning of the *Building Act*, (i.e. the Building Code)
- (ii) any applicable municipal or regional district bylaws,
- (iii) any applicable Nisga'a Government laws, or
- (iv) any applicable standard established by a treaty first nation in accordance with an agreement described in section 6 of the *Building Act*.

It must also not interfere with the provision of utilities or other services to any other strata lot or to the common property. In other words, if common property pipes must be moved, approval can be denied.

Removing the wall between two strata lots does not create a single new strata lot. That would require an amendment to the strata plan.

Obligations under the Human Rights Code

The application of the *Human Rights Code* (the "Code") to strata corporations was established by the decision in *Konieczna v. The Owners Strata Plan NW2489* 2003 BCHRT 38. The Code applies to strata corporations because they are providing "services" under s.8 of the Code in the form of managing the common property, enforcing the bylaws, etc on behalf of the owners. Section 8(1) provides as follows:

- 8 (1) A person must not, without a bona fide and reasonable justification,
 - (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or

expression, or age of that person or class of persons.

Requests for permission to do an alteration may, on occasion, have a human rights element to them. The alteration may be necessary to accommodate a person's disability or medical condition. Such requests could involve permission to install a certain type of flooring to address an allergy; install a stair lift; build a ramp; install a walk in shower, etc.

Under the Code the strata corporation is obligated to accommodate a person with a disability to the point of undue hardship – see *Mahoney obo Holowaychuk v. The Owners, Strata Plan NW332 et al* 2008 BCHRT 274. Where an owner requests accommodation on medical grounds, they must establish a nexus (or direct connection) between their disability and the requested accommodation – see *Judd v. Strata Plan LMS737* 2010 BCHRT 276. Where the strata corporation has no knowledge of the disability and no accommodation has been requested, the duty to accommodate is not triggered – see *Gardiner v. British Columbia* 2003 BCHRT 41.

Where the a request for an accommodation is made, the obligations of each party with respect to establishing the need for the accommodation and the existence of any alternate accommodation are clearly delineated in *Leary v. Strata Plan VR1001*, 2016 BCHRT 139 – see Appendix A. This division of responsibilities arises from the fact that the duty to accommodate is a joint duty in which the person requesting the accommodation must do his or her part as well – see *Renaud v. Central Okanagan School Districts #23* [1992], 2 SCR 970.

While each request involving a disability or medical element must be considered on its own, the case of *Calderoni v. Strata Council Plan No. K6* 2009 BCHRT 10 is an example of the types of claims a strata corporation may face involving an alteration request. In that case, the owner requested permission to enclose her carport and make a "handicapped accessible bedroom for medical reasons." Very little information was provided and council, for a variety of reasons, chose not to grant permission. In dismissing Mrs. Calderoni's complaint the Tribunal stated:

“It is unclear from the materials provided by Mrs. Calderoni as to why she requires the modification of the kind requested, and only that modification, in order to address her mobility concerns. For example, she does not dispute the Strata Council's assertion that the ground floor of her unit already has two finished rooms, nor does she provide much explanation of why she cannot use one of these rooms as a bedroom. She does not explain in any detail why a stairway chair lift would not meet her needs. It appears that Mrs. Calderoni has not engaged in a meaningful dialogue

with the Strata Council as to how her needs could best be accommodated”.

More importantly, the Tribunal said the following with respect to the strata corporation’s obligations regarding such a request:

“I disagree with the submission of the Strata Council that it cannot consider specific or special needs of its unit owners. However, I agree with its submission that requiring Mrs. Calderoni follow the procedure set out in its by-laws, regarding a proposed renovation, is not a contravention of the *Code*. In my view, the Strata Council has a duty to ensure that it bases its review of a proposed modification of a unit on adequate and reliable information and plans. Mrs. Calderoni did not provide the Strata Council with even a simple line drawing of what she had in mind until after she filed her complaint. There is no suggestion that what Mrs. Calderoni has proposed would satisfy local building codes. As to her physical condition, all Mrs. Calderoni has provided is a statement from an occupational therapist, and a vague reference to her "ambulatory" needs. For example, it is unclear what range of mobility she has, or what assistance she needs within her home. She had given only a vague description of the nature of her disability....”

While the bylaws provide a framework for considering the request, they cannot be used as a basis for denying permission where there is a need for accommodation. As such, any request that involves a disability or medical element (whether it be a clear request for accommodation or not) should be treated with special attention.

Giving permission

Standard Bylaws 5 and 6 both refer to the permission of the strata corporation. In most cases that means the permission of the strata council. Under ss.4 and 26 of the SPA the strata council performs the powers and duties of the strata corporation. This means that council can consider and approve requests. The one exception to that is found under s.71 of the SPA which provides:

- 71** Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless
- (a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

- (b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

What constitutes a significant change was reviewed by the court in *Foley v. The Owners, Strata Plan VR387* 2014 BCSC 1333. The court set out a list of six factors to be considered. Those are as follows:

- (1) A change would be more significant based on its visibility or non-visibility to residents and its visibility or non-visibility towards the general public;
- (2) Whether the change to the common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units;
- (3) Is there a direct interference or disruption as a result of the changed use?
- (4) Does the change impact on the marketability or value of the unit?
- (5) The number of units in the building may be significant along with the general use, such as whether it is commercial, residential or mixed use; and
- (6) Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis or has it followed the rules regarding meetings minutes and notices as provided in the *Strata Property Act*.

Whether something is a significant change is highly dependant on the facts of each case. Things which have been found to be a significant change include; the cutting of several vent holes through a wall – *Sidhu v. Strata Plan VR1886*, 2008 BCSC 92; the installation of garden lighting - *O'Neill v. The Owners, Strata Plan LMS 898*, 2018 BCCRT 20; the placement of a gazebo on a patio - *Giddings et al v. The Owners, Strata Plan BCS 3620*, 2018 BCCRT 61; extension of a deck and installation of railings – *Foley, supra*; Planting of garden beds, fruit trees and constructing a fence – *Anthony, supra*.

Things which have been held not to be significant include; the placement of potted plants on an entry way – *Reid v. Strata Plan LMS2503* (2001), 109 A.C.W.S. (3d) 524; the removal of trees where there were many trees still left - *Maguire v. The Owners, Strata Plan VIS5830*, 2017 BCCRT 77; replacement of existing railings with new ones to meet *Building Code* requirements - *Frank v. Strata Plan LMS 355* 2016 BCSC 1206;

Owners can request permission to undertake an alteration in one of two ways; by writing to the strata corporation (often through the strata manager) or by requesting a hearing under s. 34.1 of the SPA. When an owner makes a request in writing there is no deadline for council to respond to the request (although under s.164 of the SPA an owner would undoubtedly have a reasonable expectation that the request would be dealt with within a reasonable time frame. I.e. at the next scheduled council meeting). Owners should not leave their requests until the last minute and expect an answer to suit their schedule. The council is not obliged to hold a meeting and it can not invoke the emergency meeting provisions of the Standard Bylaws since there is no emergency. Every council member would have to consent to a meeting on short notice (which they might not be inclined to do).

An owner who wants an answer within a defined time frame should consider making a request for a hearing under s.34.1 of the SPA, which requires a hearing to be held within 4 weeks and an answer given 1 week thereafter

In *Grant v. The Owners, Strata Plan BCS 337*, 2018 BCCRT 70 the CRT had to consider allegations the strata corporation was too slow in providing approval. In reaching the conclusion it was not, the adjudicator made the following observations:

73... I do not find a 2 month delay unreasonable, given that the strata was waiting for its lawyer to provide advice and revisions to the alteration agreement.

74. I find that it was reasonable for the strata to ensure there was a signed alteration agreement from Ms. Grant, prior to providing consent for her renovations. As noted, the strata's obligation is to all owners equally and not any one owner individually. Given the extent of the renovations in unit 301 it was reasonable for the strata to ensure it and other owners were protected from future liability and damages.

When considering alteration requests the strata council must keep in mind its duties under s.31 of the SPA to:

- (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
- (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

Councils must not approve requests without properly reviewing them, consulting the bylaws with respect to any particular requirements set by them and considering how the proposed alteration would affect the other owners. A strata corporation, in carrying out its mandate, must consider and act in the best interests of all the owners, endeavoring to accomplish the greatest good for the greatest number - *Gentis v. Strata Plan VR 368*, 2003 BCSC 120. Sometimes that can be achieved through attaching conditions to the approval, as opposed to a complete denial.

Where it is a council member making the request, they must ensure they comply with the disclosure requirements of s.32 of the SPA and excuse themselves from the meeting where permission is considered.

There should also be absolute clarity with respect to what is being approved. Construction which differs from what was approved will be considered a breach of the bylaws - *The Owners, Strata Plan BCS 983 v. Rempel*, 2018 BCCRT 130.

The Standard Bylaws are unclear with respect to what conditions, if any, the strata council can impose when granting permission, other than mandating that “the owner agree, in writing, to take responsibility for any expenses relating to the alteration”; about which more will be said below. In *The Owners, Strata Plan BCS 983 v. Muir*, 2018 BCCRT 157 the CRT determined that the bylaws give the strata corporation broad discretion to impose conditions. Nonetheless, strata corporations can amend their bylaws to add things that might be imposed as conditions. Doing so also lets owners know what will be expected of them when applying. Some examples are:

- (a) present design drawings and specifications pertaining to the proposed work (including a letter of assurance from a structural engineer regarding any structural changes which form part of the work);
- (b) ensure that all work is done to a standard and is of a quality consistent with that of the rest of the building;
- (c) install or utilize certain materials or products;
- (d) obtain all necessary permits and governmental approvals (including final inspection certificates) and provide copies thereof to the strata corporation;
- (e) provide proof of third party liability insurance in an amount specified by the strata corporation;
- (f) employ only trades who have Worksafe coverage;

- (g) indemnify and save harmless the strata corporation and the other owners for any liens arising from the alterations (including but not limited to the actual costs incurred in removing the same);

The latter two requirements are of real importance with respect to alterations to the common or limited common property. In both instances, the strata corporation, along with the other owners in the strata corporation, could be exposed to liability. Where an owner employs trades and subtrades who do not have Worksafe coverage and they are injured, the owner of the property becomes liable for all amounts that Worksafe pays to the injured worker. Even though the strata corporation is not doing the work, it has authorized it on property over which it has control - s.3 of the SPA. Since the common property is owned by all owners as tenants-in-common (s.66 of the SPA) they could be proportionately liable for such amounts.

The same concerns arise with respect to unpaid trades. Since the work was done to the common property, the trades and suppliers have a right to register a lien if not paid. However, liens cannot be filed against the Common Property Record. They are filed against the individual strata lots; not just the strata lot which did the work. Where a larger project is approved, the strata corporation may wish to have greater involvement in the payment of the trades and the administration of the holdback under the *Builders Lien Act*.

Where an alteration to the common property is approved, such as the extension of a patio, thought should be given to whether that area needs to be allocated an exclusive use designation. Simply building a patio or enclosing an area with a fence doesn't mean that others are precluded from using it. However, it can be considered as expropriating it. In *Friedrich v. The Owners, Strata Plan K515*, 2018 BCCRT 184 the owner did extensive improvements to the yard behind their strata lot. The CRT had the following to say regarding the issue of exclusive use:

[37] I conclude from the provided photos that the owner has taken over exclusive control of the common property and is using it exclusively for her own purposes. Although other owners are not blocked from entering the garden area, I find the manner in which the area is enclosed, and the personal items the owner keeps in the area, would make it appear that this property is exclusively that of the owner. I find this interferes with the use of the common property by other owners.

...

[40] I conclude that the owner has taken over exclusive use of the common property and undertaken alterations to the common property,

including installing a shed, installing a fence or perimeter plants, and planting a garden. The owner has done so without first obtaining the express written approval of the strata under its bylaw 5 and has done so without being granted exclusive use of the common property by the strata under section 76 of the SPA. I order the owner to apply to the strata for exclusive use of the common property at issue in this dispute. The owner is required to provide a detailed plan to the strata about of the use that she intends to make of the common property and must abide by the strata's decision with respect to her request.

The owner was ordered to apply for a grant of exclusive use of the area.

Exclusive use can be designated in one of two ways; either by way of short term exclusive use under s.76 of the SPA or by way of a more permanent designation under s.74 of the SPA.

Short term exclusive use is granted by the strata council only on an annual basis and can be revoked at anytime on reasonable notice.

A designation under s.74 is the preferable choice when it comes to alterations. Under s.74 the designation is made by way of a $\frac{3}{4}$ vote at an annual or special general meeting. It can only be reversed by a similar vote. The designation, once approved, is registered in the Land Title Office against the Common Property Record.

Assumption of Liability Agreements

Under the Standard Bylaws, where permission is given for an alteration, an owner can be asked to "agree, in writing, to take responsibility for any expenses relating to the alteration." This is commonly referred to as an "Assumption of Liability Agreement" (ALA) or an "Indemnity Agreement".

The purpose of an ALA is to ensure that the strata corporation does not incur additional repair and maintenance costs as a result of the alteration. For example, if an owner constructs a deck on common property the strata corporation, absent an ALA, would have to bear the costs of repairing and maintaining that deck. As such, ALA's are critical when the alteration relates to or impacts an area which the strata corporation is obligated to repair and maintain under the SPA or its bylaws. They are not always necessary for alterations to a strata lot interior since the owner is already responsible to repair and maintain the strata lot.

An ALA cannot make the owner responsible for repairs and maintenance which the strata corporation would otherwise be responsible for. Returning to the deck example, if

an owner expands an already existing deck they can only be made liable for the costs related to the extension, not the whole deck.

A properly drafted ALA should:

- identify the strata lot to which it relates;
- set out the names of the current owners;
- clearly and fully describe the nature, extent and location of the alteration;
- require the owner to reimburse the strata corporation for any additional repair and maintenance costs it incurs as a result of the existence of the alteration;
- indemnify the strata corporation for any loss or damage it suffers as a result of the alteration (i.e. water penetration related to an exterior alteration; injury suffered by others);
- obligates the owner to remove any liens filed for work done on the common property and indemnify the strata corporation and other owners from any loss or damage resulting from the same;
- state that it “runs with the land”;
- not release the owners from liability under the agreement until the new owners assume in writing the obligations under the agreement;

The existence of an ALA is to be disclosed under a Form B. Item (c) requires:

Are there any agreements under which the owner of the strata lot described above takes responsibility for expenses relating to alterations to the strata lot, the common property or the common assets?

no yes *[attach copy of all agreements]*

S.59(5) of the SPA permits an owner to rely on what is set out in the Form B. It provides:

(5)The information in subsection (3) disclosed in a certificate is binding on the strata corporation in its dealings with a person who relied on the certificate and acted reasonably in doing so.

Where a strata corporation fails to disclose an ALA on the Form B, it will be unable to make a new owner responsible for costs related to an alteration unless it can obtain

relief under s.59(6) of the SPA, which permits the CRT, on application by the strata corporation or an owner, to give effect to or relieve the strata corporation from some or all of the consequences of an inaccurate certificate.

Both the Form B and s.59 would appear to imply that a new owner is automatically bound by the terms of the ALA signed by the prior owner. However, that may not be the case. There have been a series of recent cases dealing with easements and obligations contained in them to pay costs related to the easement area (typically a shared driveway or parking garage) – *Strata Plan NWS3457 v. Strata Plan LMS425*, 2017 BCSC 1348; *The Owners, Strata Plan BCS4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988. In those cases, the court has held that such an agreement is only binding on the parties to the original agreement, not successor owners; unless those successor owners have agreed in writing to be bound by those agreements. The same principle would arguably apply to ALA's. In order to address this potential problem, strata corporations can do one of two things:

- have a procedure (and bylaw) in place to have new owners sign the assumption agreement; or
- pass a bylaw which makes owners responsible for additional costs where that was term of the original approval.

Both systems rely on accurate record keeping. S.35(2)(g) of the SPA requires the strata corporation to keep “written contracts to which the strata corporation is a party” – which would include ALA's. Although a common practice, ALA's should not be registered in the Land Title Office. They are not bylaws and should not appear on the General Index. They may also contain personal information (i.e. phone number or email address) that owners do not want disclosed to the public (Land Title records being accessible to anyone). Does repealing all the bylaws revoke those agreements?

Repair and Maintenance

Whether the strata corporation or an owner is responsible to carry out repairs to an alteration depends on whether it forms part of the common property or part of the strata. (An ALA does not make an owner responsible to actually carry out repairs, only to reimburse the strata for the costs of doing so; although the practical effect of such an agreement is for the owner to do the repairs themselves).

At common law when an object is attached or affixed to land with some degree of permanence, it becomes part of the land and hence a “fixture”. Not everything placed on or added to the common property is considered to be affixed to it. The greater the

degree of attachment, the greater the chance it is a fixture and not a chattel. Where an object rests on its own weight it is presumed to remain a chattel. Whether it truly is a fixture depends upon whether the purpose of the attachment is (a) to enhance the land, or (b) for the better use of the chattel as a chattel. A wheelchair ramp, once it was put in place and asphalt applied to it, was held to be a fixture, given its location and obvious purpose - *Shah v. 4351 Properties Ltd.* 2008 CarswellBC 53 (B.C.S.C.). However, a stone wall was determined to be chattel - *dos Reis v. Ring* (2012), 2012 CarswellBC 199 (B.C.S.C.).

In terms of alterations within a strata corporation, this means that if something is attached to the common property (i.e. a balcony enclosure) it becomes part of the common property. This was certainly the finding in both *Newman v. The Owners, Strata Plan EPS680* 2017 BCCRT 122 and *Warren v. The Owners, Strata Plan VIS6261* 2017 BCCRT 139 where the CRT held that heat pumps (air conditioners) which serviced individual strata lots placed on the common property became common property and the responsibility of the strata corporation to repair and maintain. In *Warren*, the same reasoning was extended to a hose bib, roof top irrigation system, and landscaping installed by the owner. That is a different conclusion from the court in *Okranitez, supra* which held that they were the owner's responsibility to repair because one must look at the reality of the development itself.

Consider how the placement of a deck on common property might not be considered part of the common property. If the deck sits on pier blocks and is not attached by screws or nails to the building, it might not be considered part of the common property. In that case, an owner can be made to be responsible for its repair and maintenance. However, if the deck is supported by posts set in concrete in the ground it is clearly a fixture and becomes common property.

In *Allard v. The Owners, Strata Plan VIS 962*, 2017 BCCRT 111 the CRT held that the strata corporation was responsible to repair a solarium enclosing a balcony because it became an attachment to the building once installed and the bylaws obligated the strata corporation to repair things attached to the exterior of the building.

Where the alteration is to a strata lot or the limited common property, the bylaws can specifically make an owner responsible for alterations which might otherwise fall within the scope of the strata corporation's responsibilities under Standard Bylaws 5 and 6. For example, in *Atlas v. The Owners, Strata Plan 991* 2017 BCCRT 96 an owner was held responsible for the cost of repairs to windows which formed a balcony enclosure because the bylaws made owners responsible for alterations to a strata lot. The balconies were part of the strata lot, and as such, responsibility could be passed to the owner in whole or in part.

Strata corporations have additional motivation beyond the SPA and the bylaws to ensure that alterations to the common and limited common property are properly maintained. The *Occupiers Liability Act* (OLA) imposes a specific obligation on an “occupier” of land to “take that [level of] care that... is reasonable to see that a person, and the person's property, on the premises... will be reasonably safe in using the premises”. The OLA defines an “occupier” as a “person who (a) is in physical possession of premises, or (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises”. When it comes to the common property, the strata corporation clearly falls within that definition.

Insurance

Under s.149 of the SPA, the strata corporation is required to insure the building as built by the owner-developer. These means that alterations are generally not covered by the strata corporation’s insurance. Alterations, upgrades and improvements to a strata lot are generally covered by the owner’s insurance. An owner who does not purchase their own insurance elects to self-insure any alterations, past or present.

S.161 of the SPA permits owners to obtain insurance for property and against perils not covered by the insurance to be obtained by the strata corporation. Since that section provides that an owner “may” do so, a strata corporation cannot (by bylaw at least) require owners to obtain their own additional insurance.

Whether the strata corporation can require additional insurance in relation to an alteration depends on where that alteration is.

Given the reference in s.161 of the SPA to fixtures within a strata lot and *improvements to them*, the requirement for additional insurance for alterations to the strata lot cannot be imposed on an owner.

With respect to alterations to the common property, it is unclear whether requiring an owner to insure alterations to the common property is prohibited. S.161 does not reference common property. However, it is likely the case that an owner cannot obtain insurance in relation to the common property since their insurable interest is fractional. It may also be unnecessary. Depending on the terms of the policy, improvements to the common property might be covered depending on the wording of the policy. An example of one policy is:

“All Property” of every description located within the property boundaries at the location shown on the Certificate of Insurance issued against the

Master Policy including, but not so as to limit the generality of the foregoing, **all common property**, individual strata units and individual dwelling units comprising all structures, **together with their additions, extensions, attachments**, and services, and all other property **(except as herein excluded under Clause 3.)** owned by the “Insured” or for which they are legally liable or for which they may have responsibility to insure or in which they have an insurable interest, while at the location(s) specified in the Certificate of Insurance issued against the Master Policy. *(emphasis added)*

In this particular policy, improvements and betterments to strata lots are excluded by clause 3.

Strata corporations may wish to require owners have liability insurance in place for the period during which the alterations are being carried out. However, the wording of s.161 appears to prohibit that as well since it refers to “liability for property damage and bodily injury, whether occurring on the owner's strata lot or on the common property” as one of the coverages owners “may” obtain. Course of construction insurance (which is likely only available for larger projects) would be an alternative to consider.

Even, if additional coverage is in place that does preclude an owner from claiming under the strata corporation’s policy instead of their own. Under s.155 of the SPA each owner and tenant is a named insured on the strata corporation policy and thus has a right to the benefits of that policy.

Dealing with unapproved alterations

Despite bylaws which clearly require owners to obtain permission before they alter their strata lot or the common property, there are owners who will do so without complying with the bylaws. When that happens, strata corporations need to develop a plan to deal with those situations. The SPA provides some assistance in that regard with respect to enforcement tools.

The primary methods for enforcing the bylaws of a strata corporation are:

- (a) imposing fines against the offending tenant or owner;
- (b) taking steps to remedy a contravention pursuant to s.133 of the SPA;
- (c) seeking an order of the CRT that the owner comply with the bylaws.

No matter what method the strata corporation chooses it needs to ensure that it has complied with the “due process” provisions of the SPA. Those provisions are found in

s.135 of the SPA and require notice of the breach (accompanied by particulars of the breach) and an opportunity to respond to the allegations before any decision is made.

Standard Bylaw 24 would apply to unauthorized alterations. It provides:

“If an activity or lack of activity that constitutes a contravention of a bylaw or rule continues, without interruption, for longer than 7 days, a fine may be imposed every 7 days.”

For as long as an alteration remains unauthorized a fine can be imposed every week until it is removed or approval is obtained. (The fines may be reduced if a strata corporation waits too long to seek an Order from the CRT).

A strata corporation can also take steps under s.133 of the SPA to physically remove an unauthorized alteration. Where that alteration is in a strata lot the strata corporation will need to rely on Bylaw 7 to gain access to the strata lot. A CRT order allowing access may become necessary if it is refused.

After complying with s.135, the charges for removing the alteration and restoring the common property or strata lot can be charged back to the owner. However, they are not costs for which a lien can be filed under s.116 of the SPA.

Where the alteration is to a strata lot and is a breach of the *Building Code*, a municipality can issue a work order directing the owner to restore the strata lot. Where the owner fails to do so, the strata corporation can do the work. In that case, the costs incurred can form part of a lien under s.116. – see s.85 of the SPA. No such provision exists for the common property.

An alternative to fines and removal of the alteration would be to seek an order of the CRT directing the owner to remove the offending alteration or alternatively allow the strata corporation to do so. Such orders are granted. In *The Owners, Strata Plan BCS 983 v. Rempel*, 2018 BCCRT 130 the court ordered the owner to remove part of a canopy which exceeded what had been approved. In *Boyer v. Downey et al*, 2018 BCCRT 156 the owner was ordered to repair damage caused by an unauthorized alteration. However, the CRT will not necessarily always grant a removal order in the first instance. In *Wu v. Hu and The Owners, Strata Plan BCS 3579*, 2017 BCCRT 81 it ordered an owner who constructed a fence without approval to apply for retroactive permission.

A strata corporation should not delay in seeking an enforcement order. In *The Owners, Strata Plan KAS 510 v. Nicholson*, 2017 BCCRT 48 the CRT refused to order the removal of a deck where it had been more than two years since it was

installed without permission. It held that the time under the *Limitation Act* had expired precluding enforcement.

Granting retroactive permission is one means of dealing with a lack of approval. Although an owner may have breached the bylaws by failing to ask for approval, that does not preclude the strata corporation from granting it after the fact; provided the owner meets all requirements for approval. The offending owner can either be fined for the initial breach or fined on a weekly basis until approval is granted (presuming there are steps to work through).

In *Getzlaf v. Strata Plan VR 159* 2015 BCSC 751 the court identified certain principles that apply when deciding whether an owner should be allowed to keep an alteration done without approval and for which retroactive approval won't be granted by the strata corporation. Those include:

- a strata corporation, in carrying out its mandate, must consider and act in the best interests of all the owners. It must endeavor to accomplish the greatest good for the greatest number. See *Gentis v. Strata Plan VR 368*, 2003 BCSC 120 at para. 24;
- strata corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners.
- the court should only interfere with the use of this discretion if it is exercised oppressively or in a fashion that transcends beyond mere prejudice or trifling unfairness. In other words, if the decision to refuse permission was significantly unfair *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 at para. 27; and
- it is no justification for an owner to say that he was unaware or had forgotten that prior permission was required before he could erect a fence on common property. A petitioner who seeks what is essentially injunctive relief should come to court with "clean hands". See *Barnes v. Strata Corp. NW3160*, [1997] B.C.J. No. 1081 (B.C. S.C.) at paras. 6, 10-11.

In *Allwest*, the court determined the fact that the owner proceeded to carry out the alteration (believing permission was not required under the bylaws) weighed against them when determining whether the strata corporation acted in a manner which was significantly unfair under s.164 of the SPA .

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

Appendix A

In *Leary v. Strata Plan VR1001*, 2016 BCHRT 139 the Human Rights Tribunal set out a framework for addressing an request for accommodation.

The person seeking accommodation must:

- Advise the strata council of their disability and provide enough information for the strata council to understand that the person has a disability.
- Co-operate with the strata to provide sufficient medical information to establish the need for accommodation and allow the parties to understand what options are appropriate. This may include a medical report. A brief doctor's note on a prescription pad will probably not be comprehensive enough.
- Co-operate with the strata to discuss possible solutions. The person seeking the accommodation is not entitled to a *perfect* accommodation, but to one that reasonably addresses their needs and upholds their dignity in their housing.
- Co-operate with professionals or other parties who may have to be involved to explore accommodation solutions. Including facilitating access to their unit and ongoing requests for information.

The strata council must:

- Address requests for accommodation promptly, and take them seriously.
- Gather enough information to understand the nature and extent of the need for accommodation. (The strata is entitled to request medical information that is related to the request for accommodation. It is not entitled to any more information than is strictly necessary for this purpose. If the strata requests further medical reports, it should be at the strata's expense.)
- Restrict access to a person's medical information to only those individuals who are involved in the accommodation process and who need to understand the underlying medical condition.
- Obtain expert opinions or advice where needed.
- Take the lead role in investigating possible solutions.
- Rigorously assess whether the strata can implement an appropriate accommodation solution.

- Ensure that the strata representatives working on the accommodation are able to approach the issue with an attitude of respect.