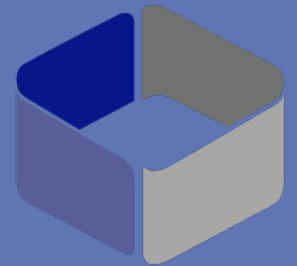


VISOA

**HEAT PUMP AND AIR
CONDITIONING
REQUESTS**



PRESENTED BY SHAWN M. SMITH



**Cleveland
Doan LLP**

**Strata
Lawyers**



WHO WE ARE

- We are a full service law firm with a focus on strata property law. We have been advising strata corporations since the introduction of *The Strata Property Act* in July 2000.
- We deal with all the issues strata corporations face, but with a particular focus on:
 - Collections;
 - Bylaw packages;
 - Bylaw enforcement;
 - Governance matters; and
 - CRT claims.



WHAT WE WILL TALK ABOUT

- Handling requests to install – do owners need permission?
- When you can say no (and when you cannot)
- What to consider when approving a request
- Addressing future issues that can arise



WHAT ARE WE TALKING ABOUT?

Heat pumps are different from air conditioners:

[25] I find that although a heat pump can be a part of an air conditioning system, it is different from an “air conditioning unit” in that an air conditioning unit provides only cooling of the air.

- *Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591*, 2017 BCSC 1646



WHAT ARE WE TALKING ABOUT?

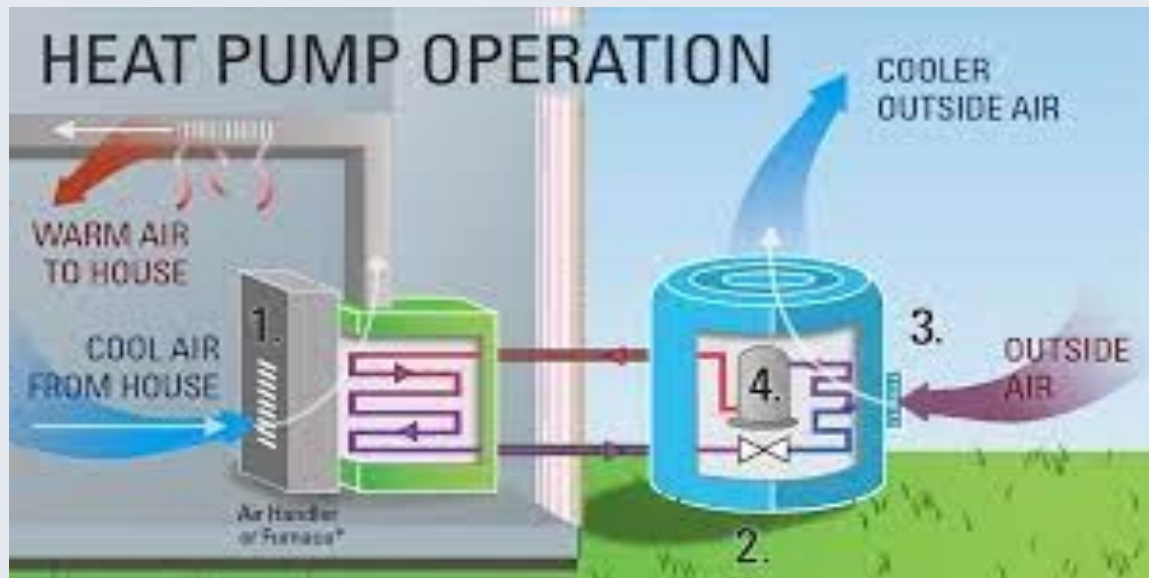
HEAT PUMPS





WHAT ARE WE TALKING ABOUT?

HEAT PUMPS





WHAT ARE WE TALKING ABOUT?

MINI-SPLIT





WHAT ARE WE TALKING ABOUT?

AIR CONDITIONERS





WHAT ARE WE TALKING ABOUT?

Some terms:

- **Condensing unit – outdoor component**
- **Evaporator/blower – indoor component**
- **Conduit – the pipes that connect the two**



WHAT ARE WE TALKING ABOUT?

Systems without external component





WHAT ARE WE TALKING ABOUT?





WHAT ARE WE TALKING ABOUT?





IS PERMISSION REQUIRED?

Standard Bylaws under SPA

- 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.
- 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.



IS PERMISSION REQUIRED?

- [23] ... immaterial changes to common property will not be “alterations” for the purposes of Bylaw 6(1). It seems to me, however, that on any sensible definition of “alteration”, the cutting of a 2-inch hole in an exterior wall, and the installation of permanent pipes in the wall and out to a heat pump constitutes an “alteration” that is material....
- [24] Because the heat pump was both affixed to the patio and permanently attached to the pipes, I also agree with the chambers judge’s conclusion that it constituted an alteration to the common property.

Allwest International Equipment Sales Co. Ltd. v. The Owners, Strata Plan LMS4591, 2018 BCCA 187



IS PERMISSION REQUIRED?

[45] In my view, there is little question that the installation of the System constitutes an alteration of common property...There is little to distinguish this method of installation from what occurred in Allwest,... Both involve an alteration to the structure of the building.

[46] Further,... the condenser units were affixed to the external patio of Unit 700. Although SFU says that the units were affixed to the patio pavers so as to not compromise the patio membrane, the fact that the units were affixed is consistent with a finding that there was an alteration to the patio.

Simon Fraser University Foundation v. The Owners, Strata Plan BCS 1345, 2021 BCSC 360



IS PERMISSION REQUIRED?

There may be specific bylaws that address air conditioners and heat pumps.

Bylaw 3(2)(b) - an owner must not install or attach an air conditioner on a balcony or other part of the building so that it is visible from the outside of the building.

- *Ottens et al. v. The Owners, Strata Plan LMS 2785 et al.*, 2019 BCCRT 997



IS PERMISSION REQUIRED?

The strata corporation may have a very detailed bylaw that:

- Sets out what information is required to apply
- Establishes conditions to be met for approval
- Specifies certain criteria regarding the installation
- May even address location(s) and noise levels



GIVING PERMISSION

- Standard Bylaw 6 will always apply since at least part of the system will be on common property.
- Unlike Standard Bylaw 5, there is no obligation on the strata to be reasonable when refusing permission.
- The strata has considerable discretion in deciding whether to approve the installation of a heat pump. - *Molloy v. The Owners, Strata Plan VIS 2316*, 2020 BCCRT 73



GIVING PERMISSION – S.71

s.71 *Strata Property Act* [“SPA”]

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

...

(b) the change is approved by a resolution passed at an annual or special general meeting

...

(ii) by a 3/4 vote, ...



GIVING PERMISSION – S.71

“Foley Factors”

- (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;



GIVING PERMISSION – S.71

“Foley Factors”

- (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?



GIVING PERMISSION – S.71

“Foley Factors”

- (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*.



GIVING PERMISSION – S.71

Fleming v. The Owners, Strata Plan 1290, 2021 BCCRT 1117 – applied Foley factors and found it a significant change

- units create noise which can disturb people
- In a residential strata that is a greater issue
- Improves use of the strata lot
- Likely improves marketability
- Strata had not approved any before

Visibility not a factor in this case



GIVING PERMISSION – S.71

Leishman v. The Owners, Strata Plan VR 2648, 2022 BCCRT 1136 – installation was a significant change:

- visible to other units and people walking by
- improved conditions in strata lot
- small strata (23 units)
- had not allowed them before
- high degree of permanence (not a Foley factor)



GIVING PERMISSION – S.71

Not every installation is a significant change - *Richardson v. Simmons*, 2020 BCCRT 241.

- Other strata lots have air conditioners
- Not visible from the road or any other strata lot
- Only a minor positive impact on value



GIVING PERMISSION – S.71

S.71 approval can be achieved by:

- **A bylaw specifically authorizing heat pumps and air conditioning units;**
- **A resolution approving their installation generally, subject to the alteration bylaws;**
- **Approval on a case by case basis**



GIVING PERMISSION – S.71

- S.71(a) permits a change without a vote if there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage,
- A lack of heat is not automatically an emergency under s.71(a) - *Peace v. Hyde*, 2020 BCCRT 1284
- Conversely, neither would a need for air conditioning (cooling)



THINGS TO CONSIDER

When reviewing a request council must consider the impact on the building.

- Penetrating the envelope (water ingress)
- Vibration (if on balcony or roof)
- Noise – how loud is the condenser when operating?
- Condensate draining (where does it go?)



THINGS TO CONSIDER

When reviewing a request council must consider the impact on the building.

- Weight an issue? (if on balcony or a roof)
- Appearance (should it be screened with lattice or a hedge?)
- Is the conduit hidden? Should it be painted?
- Future repair and maintenance



THINGS TO CONSIDER

When reviewing a request council must also consider the complex's electrical capacity:

- Where will the unit be connected to?
- How many units can the building/complex handle?
- How does that interact with EV charging?

Electrical planning report may help with those issues.



THINGS TO CONSIDER

When reviewing a request council must also consider the potential for noise and the impact on others.

Suzuki v. Munroe, 2009 BCSC 1403

“In my view, most people would consider an air conditioning unit operating in excess of 50 decibels only a few feet from one’s bedroom window as being a serious and substantial interference with one’s enjoyment of property”.



SAYING YES

Be clear and precise about:

- **what is being approved**
- **where it is going**
- **any specific requirements for installation**
- **any other conditions to be met (i.e. supply a permit, sign an assumption of liability agreement, etc.)**

The authority for which should ideally be found in the bylaws.



SAYING YES

- Approval letter and Assumption of Liability should be different documents
- Does strata need/want to inspect for compliance? At whose cost?
- A failure to comply with approval terms means alteration is unapproved – *Matthews v. The Owners, Strata Plan BCS3063* 2023 BCCRT 631



SAYING NO

- Not every request must be or even can be approved.
- Where the strata says no, it must have a clear and identifiable reason.
- There should be an explanation or evidence addressing how and why the Council made its decision - *Simon Fraser University Foundation v. The Owners, Strata Plan BCS 1345*, 2021 BCSC 360



SAYING NO

Reasonable and justifiable to refuse where the strata was concerned about:

- noise created,
- others potentially also requesting a heat pump,
- piercing the envelope of the building,
- control over the common property,
- other owners having expressed disapproval.

- *Molloy v. The Owners, Strata Plan VIS 2316*, 2020 BCCRT 73



SAYING NO

- Concerns about the cumulative effects of multiple units were well-founded and a valid consideration - *Rasmussen v. The Owners, Strata Plan VIS 1611*, 2022 BCCRT 711
- The strata had good faith reasons for refusing to approve the air conditioner. No suggestion that the strata had an ulterior motive - *Quan v. The Owners, Strata Plan LMS 4582*, 2019 BCCRT 826



SAYING NO

- Saying no could be significantly unfair (s.164 SPA)
- The strata acted unreasonably in refusing to approve an alternate installation of the heat pump would close the hole in the building envelope - *The Owners, Strata Plan LMS 2597 v. West*, 2019 BCCRT 856
- The strata has considerable discretion and if it continues to explore the matter, it could deny or withhold permission without acting in a significantly unfair manner. - *Clarke v. The Owners, Strata Plan LMS1257*, 2023 BCCRT 799



MEDICAL REQUESTS

S.8 Human Rights Code

(1) A person must not, without a bona fide and reasonable justification,

...

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of.. **physical or mental disability...**



MEDICAL REQUESTS

- A strata corporation is considered to provide “services which are customarily available to the public” - *Konieczna v. The Owners Strata Plan NW2489*, 2003 BCHRT 38.
- As a result of its carrying out its statutory duties under the SPA, strata corporations have been held to be providing “management services”.

Williams v. Strata Council No. 768, 2003 BCHRT 17;
The Owners, Strata Plan LMS 2900 v. Hardy, 2016 CR
TBC 1



MEDICAL REQUESTS

What constitutes a “disability” was discussed in *Anastacio v. Patterson Dental*, 2014 BCHRT 111:

Generally requires a state that is:

- involuntary,
- has some degree of permanence, and
- impairs a person's ability, in some measure, to carry out the normal functions of life.



MEDICAL REQUESTS

What constitutes a “disability” continued:

- Normal ailments such as a cold or flu are not disabilities.
- Medical conditions characterized by **significant degree of permanence** and which **substantially interfere with a person's ability to participate fully in his or her employment and enjoyment of life.**



MEDICAL REQUESTS

Leary v. Strata Plan VR1001, 2016 BCHRT 139:

- Establishes the framework for dealing with a request for an accommodation.
- Obligations fall to both the owner and the strata corporation in exploring an accommodation

Ottens et al. v. The Owners, Strata Plan LMS 2785 et al., 2019 BCCRT 997 – Bylaws prohibited air conditioners so council could not approve them. It simply could not enforce the bylaw.



MEDICAL REQUESTS

- Doctor's letter only said owner required air conditioning unit, not a heat pump. No need to approve heat pump. - *Binge v. The Owners, Strata Plan LMS 988*, 2023 BCCRT 441
- To trigger an accommodation, an owner has to prove some adverse impact flowing from the refusal to allow them to install - *Macario v. Strata Plan BCS1296 and another*, 2017 BCHRT 25



REPAIR AND MAINTENANCE

- A unit located on common property is part of the common property – *Newman, 2017 BCCRT 122; Bowie, 2020 BCCRT 733; Munro, 2020 BCCRT 991*
- Fact that it services only one strata lot makes no difference
- S.72(1) SPA and Standard Bylaw 8(b) the strata corporation must repair and maintain common property and common assets.
- Exterior components are strata responsibility



REPAIR AND MAINTENANCE

- Interior and exterior components are integrated into a single system. If one part is common property, all of it is - *Bowie v. The Owners, Strata Plan VIS 5766*, 2020 BCCRT 7
- Interior components are part of strata lot and owner responsibility - *Harach v. The Owners, Strata Plan EPS4920*, 2023 BCCRT 207



REPAIR AND MAINTENANCE

Responsibility for those repairs can be transferred to owners by way of:

- an Assumption of Liability/Alteration Agreement

or

- placing the exterior component on limited common property and amending the bylaws (s.76(2) SPA)



REPAIR AND MAINTENANCE

Assumption of Responsibility/Indemnity Agreements

- Must be a bylaw in place that allows council to impose it
- Future owners are bound by it under the Form B

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]



REPAIR AND MAINTENANCE

What should be addressed in an agreement?

- Carry out repairs and maintenance
 - Costs to move it for strata work
 - Indemnity for damage
 - Release of claims by owner
 - Right of strata to inspect at owner's expense
-
- Bylaw should ideally reflect those terms



REPAIR AND MAINTENANCE

Limited Common Property (LCP) approach

- S.74 SPA – can designate LCP on sketch plan by $\frac{3}{4}$ vote.
- Can designate the heat pump pad as LCP and amend bylaws - *Dowsley v. The Owners, Strata Plan VIS 5766*, 2022 BCCRT 686 and *Joyce v. The Owners, Strata Plan EPS3046*, 2023 BCCRT 36
- Or can place it on existing LCP area and amend bylaws



NOISE

Standard Bylaw 3(1) - must not use a strata lot or the common property in a way that:

- (a) causes a nuisance or hazard to another person,
- (b) causes unreasonable noise,
- (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,



NOISE

- CRT decisions have recognized that heat pumps have the potential to create unreasonable noise.
 - *The Owners, Strata Plan 1674 v. Graham*, 2019 BCCRT 74
 - *Peace v. Hyde*, 2020 BCCRT 1284
- Operation of a heat pump can be a nuisance - *Suzuki v. Munroe*, 2009 BCSC 1403



NOISE

Peace v. Hyde, 2020 BCCRT 1284

- confirms a duty to investigate whether noise is nuisance or unreasonable
- requires testing of some sort (not necessarily professional)
- reasonableness of noise is **more than just the decibel rating** and involves consideration of the duration of the noise (infrequent vs. constant), changes in pitch and volume, the time of day, and other factors.



NOISE

- Cannot make a blanket finding that noise will never be unreasonable. Must undertake a **contextual evaluation of the circumstances of the complaint.** - *Kinzie v. The Owners, Strata Plan KAS2082, 2023 BCCRT 851*
- Previously installed unit not exempt from noise bylaw passed by strata - *The Owners, Strata Plan 1674 v. Graham, 2019 BCCRT 74*
- Bylaws allowing heat pumps should deal with how to address noise issues



GOING FORWARD

- Develop a comprehensive approach to heat pumps and air conditioners
- Assess electrical system capacity. How many can you say yes to
- Put good bylaws and assumption of liability agreements in place
- Monitor how its going



QUESTIONS

QUESTIONS

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The information provided during this presentation is of a general nature and should not be taken as legal advice about a specific situation.