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Memorandum

To: President Strata Council
From: Tim Peters
Date: December 14, 2011
File No: 5674-001

Re: Collection of Special Assessments

There is some concern among the ownership group as to possible negative implications on the construction schedule in the event that one or more owners fail to pay their share of any assessment levied by the strata corporation in a timely manner. This memorandum is intended to address that scenario.

The Construction Contract

Most standard form contracts require the owner to provide evidence that adequate financing is in place throughout the course of construction. For example CCDC2 provides:

The *Owner* shall, at the request of the *Contractor*, prior to execution of the Agreement, and/or promptly from time to time thereafter, furnish to the *Contractor* reasonable evidence that financial arrangements have been made to fulfill the *Owner's* obligations under the *Contract*.

The *Owner* shall notify the *Contractor* in writing of any material change in the *Owner's* financial arrangements during the performance of the *Contract*.

Failure to provide evidence of financing constitutes a default of the construction contract:

The *Contractor* may notify the *Owner* in writing, with a copy to the *Consultant*, that the *Owner* is in default of the *Owner's* contractual obligations if:

the *Owner* fails to furnish, when so requested by the *Contractor*, reasonable evidence that financial arrangements have been made to fulfill the *Owner's* obligations under the *Contract*,

Accordingly, it is important that strata corporations take timely action to ensure that they can meet their contractual obligations.

Collecting Money

Depending on the circumstances, a strata corporation may enforce payment of money due to the strata corporation by:

- (a) interest on arrears;
- (b) fines for late payments;



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- (c) demand notices;
- (d) liens on the title of the strata lot;
- (e) withholding a Certificate of Payment (Form F); and
- (f) court actions, or arbitration.

Given the fairly short construction schedule, the strata corporation will want to move quickly with one or more of the above steps to ensure that adequate financing is in place to meet the obligations of the owners.

Liens

In my experience, if there is sufficient equity in the lands and premises to satisfy the amount of the indebtedness, most strata lot owners will find a way to satisfy payment of the special assessment. However, from time to time, strata corporations are required to take steps to enforce their lien rights. To that end, a strata corporation may commence a petition to seek judgment on the lien claim and an order to sell the owner's strata lot. It is not necessary to first authorize the enforcement proceeding by way of a resolution passed by a $\frac{3}{4}$ vote at an annual or special general meeting.

On hearing of the petition, a court will first determine the sum properly owing to the strata corporation and enter judgment for that amount, plus pre-judgment interest and costs against the owner. After entering judgment in favour of the strata corporation the court will order the defaulting owner to pay the amount owing within the specified period of time. The payment period is set at the court's discretion. In most cases, this serves as a standstill period in which nothing happens to the property while the owner exercises his or her last chance to pay the debt and escape the lien proceedings. Usually, the payment period is set at 30 days, although the court has discretion to make the period shorter or longer. Failing payment by the deadline, the strata corporation may list the strata lots for sale.

The strata corporation typically lists the owners' strata lots for sale with a real estate agent. After a buyer is found, the court must approve the sale. In accordance with the court order, the sale proceeds are applied to the real estate commission, if any, the amount owing to the strata corporation under the lien, including certain legal costs, and then to the mortgagees and other charge holders on title. The claim of lien will have priority over all mortgagees.

In my experience, the time period from the filing of a claim of lien to sale of the property can range from 2 to 12 months.

Oftentimes, if an owner is delinquent in paying his or her strata fees or special assessment, he has also fallen behind on his mortgage payments. In that event, a lending institution may commence separate foreclosure proceedings. Given that mortgagees stand behind a claim of lien, it is not unusual for a lending institution to pay any strata fees and special assessment in arrears, with a view to preserving their interest in the lands and premises.

Contingency Reserve Fund



The *Act* permits a strata council to spend money from the operating fund or the CRF without prior approval from the owners if there are reasonable grounds to believe that an immediate expenditure is necessary to ensure safety or prevent significant loss or damage, whether physical or otherwise (s.98 of the *SPA*). In my view, a reasonable argument could be made that funding any shortfall created by an owner's failure to pay a special assessment when due, at least on a temporary basis, could be made under s.98.

Borrowing

A strata corporation may borrow money to exercise its powers and duties, if the eligible voters approve the transaction by a $\frac{3}{4}$ vote at a general meeting (s.111 of the *SPA*).

When borrowing money, the *Strata Property Act* permits a strata corporation to give or lend security for the loan by way of a mortgage, the assignment of unpaid strata fees or special levies, or negotiable instrument. Note, however, that the *Act* prohibits the strata corporation from giving a mortgage over common property. In my experience, lenders typically require strata corporations to pass a special assessment as a condition of funding.

Given the costs associated with borrowing monies from a third party, and the remedial measures available to the strata corporation against the delinquent owners under the *Act* and bylaws, the owners should consider funding any shortfall from the *CRF* or operating and treat the borrowing powers as a last resort.

Closing Comments

In my experience, most contractors are prepared to work with strata corporations who face funding challenges if they address those challenges with the contractor earlier rather than later. For example, some contractors may be content to accept late payment of invoices properly due and owing where alternate arrangements satisfactory to the parties are put in place. In all cases however, contractors will need to have confidence that steps are being taken by the strata corporation to fulfill their contractual obligations.