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Three Ways Boards Run Afoul of Their Statutory Duties

By Sonja Hodis

There are many duties the current Condominium Act (1998) requires directors to fulfill. Case law and experience suggest that there are certain duties that some boards and their directors tend to run afoul of or choose to ignore. Here are three common breaches and tips on how to avoid them:

1. Failing to fulfill maintenance and repair obligations

Sections 89 and 90 of the Condominium Act set out the default repair and maintenance obligations of a condominium corporation. These default provisions can be altered by a corporation's declaration in accordance with section 91.

Whatever the corporation's maintenance and repair obligations, the board must fulfill them. Failing to do so can result in claims against the corporation requiring damages to be paid out to owners. For example, in Ryan v. York Condominium Corporation No. 340, the corporation had to pay close to $70,000 for failing to fix a water infiltration problem in a timely manner.

What to do? Take reasonable steps to repair and maintain the common elements as quickly as possible.

The corporation's duty to repair and maintain has been highlighted by an increase in smoke migration complaints in condominiums. Failing to properly maintain and repair a common element which is causing the smoke to migrate from one unit to another can attract liability, even though the corporation is not the cause of the smoking. Corporations may not only face a court application, but also a human rights complaint if the smoke is affecting a person with a disability.

What to do? If the corporation receives a smoke migration complaint, investigate how the smoke is migrating as soon as possible.

The corporation may need to hire a smoke migration consultant to see if any common elements need repair or replacement to prevent the smoke from migrating. This testing will help determine whether the problem is a maintenance/repair issue for the corporation or unit owner or just a nuisance claim. If there are deficiencies in the common elements that cause the smoke to migrate from one unit to another, repair them immediately to avoid further liability.

2. Failing to ensure status certificate accuracy

Directors may delegate the task of completing status certificates to their property manager. However, boards must be aware that they have a statutory duty to ensure that the status certificates are accurate.

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An error in a status certificate can lead to claims against the corporation resulting in payouts to new purchasers who relied on the incorrect information. Alternatively, it may lead to a financial loss for the corporation if it can't collect special assessments from new purchasers. In Orr v. MTCC 1056 and 673830 Ontario Limited v. MTCC 673, the condominium boards learned the consequences of failing to fulfill this duty the hard way.

What to do? Regardless of who prepares the status certificates, the board should review the status certificate information at least once a year. Ideally, the board should review the status certificate information every quarter. If the corporation has any ongoing litigation or knows about the potential for a special assessment in the near future, amend the status certificate to reflect the change in circumstances or knowledge of additional expenditures that will affect the common expense fees.

Do not add information that is not required in the standard form. This can needlessly create extra liability, as the condominium corporation did in the Orr case.

The board can not alter the corporation's statutory duty to ensure the accuracy of the status certificate. However, it can assign responsibility for errors and their associated costs to a third party such as the corporation's property manager.

Carefully review the corporation's management agreement to ensure that the liability for accuracy and completeness of all information contained in the status certificate rests with the management company. Also check that the management company bears liability for all costs incurred by the corporation as a result of any errors the management company makes in preparing the status certificate. This may allow the condominium corporation , such as MTCC 673, to get reimbursed for its costs when there is a mistake in a status certificate prepared by the property manager.

3. Failing to hold validly requisitioned meetings

Section 46 of the Condominium Act requires the board to hold an owner's meeting when it has received a valid requisition. To be valid, the requisition must be signed by owners representing at least 15 per cent of units and state the nature of the business to be presented at the meeting.

If the requisition is valid, the meeting must be held within 35 days or at the next annual general meeting if the requisitionists so request. If the board does not comply with this duty, the requisitionists can call the meeting and be reimbursed by the corporation for the reasonable costs incurred to call the meeting.

Many times, these requisitions result in a power struggle between the board and a group of unhappy owners. In order to show who is in control, some boards will

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spend a great deal of time and money trying to find a way to avoid holding the meeting.

However, boards should think twice about trying to avoid holding a requisition meeting. The courts have reiterated that the ability of an owner to requisition a meeting is an important democratic right in a condominium. Accordingly, the courts have liberally interpreted the requirements for a requisition based on the legislation's goal of consumer protection. (See Hogan v. MTCC 595.)

The courts will not let boards create obstacles to prevent owners from calling a meeting. Nor will the courts allow boards to deny owners the right to a meeting on technical breaches or strict interpretations of the wording of the legislation.

Failing to call a validly requisitioned meeting can result in a court order for the corporation to hold the meeting and pay the costs of the owner(s) who obtained the court order. However, the court will not require a board to hold a meeting where the requisition contains false and misleading information.

What to do? If the board gets a requisition, make sure the nature of the business to be presented at the meeting is clear. Also verify that 15 per cent of owners listed in the corporation's records under section 47(2) and who are entitled to vote (not more than 30 days in arrears) have actually signed the requisition. Many times, requisitionists will have tenants who are occupying the unit sign. Tenant signatures cannot count toward the 15 per cent. In addition, if two owners from the same unit sign, they only count as one owner.

If the requisitionists have met the requirements under section 46(1), determine whether they wish to have the issue addressed at the next AGM or a special meeting called. Use this opportunity to talk to the requisitionists to see if the board can resolve the issues outside of a meeting. If the requisitionists are prepared to waive the meeting, be sure to document this agreement in writing.

If they do not consent to the issue being addressed at the next AGM or do not waive the meeting, the board should call the meeting. Be sure to deal with the issues as outlined in the requisition letter. Have the corporation's legal counsel review the requisition to determine what, if any, action can be taken at the meeting or whether the meeting will be just a discussion.

The board shouldn't waste its time or the corporation's resources fighting over whether the meeting should be held unless the requisition contains false and misleading information. The board's time and corporation's resources are better

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used educating owners about the issues — possibly with help from a guest speaker — and giving owners an opportunity to be heard at the meeting. The requisition may signal that a bigger issue needs to be addressed.

It's important to be aware of these three common breaches because, as shown in the above examples, when boards run afoul of their legal duties it can create liability for the corporation.

Sonja Hodis is a litigation lawyer based in Barrie that practices condominium law in Ontario. She advises condominium boards and owners on their rights and responsibilities under the *Condominium Act, 1998* and other legislation that affects condominiums. She represents her clients at all levels of court, various Tribunals and in mediation/arbitration proceedings. Sonja can be reached at (705) 737-4403, sonja@hodislaw.com or you can visit her website at www.hodislaw.com. You can also watch her videos at www.condoinmotion.com

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