

# THE NOISE ISSUE

KNOWING WHAT TO DO ABOUT IT (AND MORE)

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"**CONDOMINIUM**" is a form of shared property ownership. In a traditional, or "standard", condominium, each owner has exclusive title to his or her individual unit and shares ownership with the other owners of the "common elements". It is the sharing aspect of condominiums that gives rise to both the benefits and the burdens of condominium living. When property is shared, it is necessary to have rules that everyone willingly follows in order to preserve the benefits of owning and occupying the property. The condominium needs to have the means of enforcing rules when a unit occupant doesn't comply. These are all things that the Condominium Act, 1998, S.O. 1998, c. 19, (the "Act") and the individual condominium's documents (the declaration, by-laws and rules) put into place. It is the duty of the condominium's Board of Directors to carry out such enforcement.

It is also the responsibility of the Board to manage the affairs of the condominium generally in a manner that is honest, in good faith, with the care, diligence and skill of a reasonably prudent person (s. 37(1) of the Act). In addition, the Board has a fiduciary duty toward the condominium as a whole.

These principles combine to reinforce the proposition that, when dealing with conflicts which arise between unit owners or occupants, the Board must take a community-centred approach. This requires the Board to treat each unit owner and occupant reasonably and with fairness, not making rash decisions, biased assumptions or taking any unwarranted enforcement action against any person. In our view, approaching issues within the condominium in this manner will, in almost all cases, avoid serious and costly legal action and ultimately preserve and strengthen the peace and comforts of condominium living.

Among the most common problems when living in close quarters with other people are the challenges of putting up with necessary noise and silencing inappropriate disturbances. Any sensibly organized condominium will contain clauses in its declaration or rules that prohibit inappropriate noise. However, it is sometimes difficult to determine to what extent the nuisance behind a noise complaint is the insensitivity of the noise-producing neighbour or the over-sensitivity of the complainant. This determination can be the key to deciding how the Board should deal with the situation.

Consider the following fact scenario...

- The condominium is an apartment-style building. The units in question are located directly one on top of the other and have identical floor plans.
- The condominium building, in general, is constructed such that there are few, if any, noise barriers between units.
- The condominium declaration prohibits unit owners from causing any annoyance to another unit occupant and or disturbing the comfort or enjoyment of another unit occupant. It also specifically provides that it is within the discretion of the Board of Directors to determine whether any particular noise is an annoyance.
- An owner complains of noises originating in the unit immediately above. The noises complained of include such things as walking on hardwood floors, opening and closing balcony doors and the sounds of teenage unit occupants wrestling in the common element hallways of the building.

- The complaining owner has made noise complaints about both the current and prior occupants of the unit above citing many of the same concerns.

In this situation, the Board's first step, pursuant to the declaration and in accordance with its fundamental duties and responsibilities, is to make an assessment of the validity of the complaints being made by the owner in the lower unit. That is, the Board should neither be compelled to action simply because a unit owner complains, nor should the Board ignore the issue solely on the basis that the unit owner in question always complains. In our view, it is always consistent with the Board's basic fiduciary obligations to the condominium as a whole to investigate, assess and confirm whether a genuine problem exists before refusing or attempting to act upon any claim or complaint.

It should be noted, however, that the provisions in some declarations are worded in ways that make, or appear to make, it incumbent upon the Board to respond affirmatively solely on the basis of a unit owner's complaint. In our view, such provisions are not helpful to the Board in respect of managing the condominium in a reasonable and community-centred manner. Indeed, if such provisions were found in the rules of the condominium, rather than in its declaration, it is possible they could be determined to be unreasonable in certain circumstances, which could render such rules unenforceable. Although provisions in a declaration are not held to the same standard of reasonableness as rules, in our view it is still appropriate for Boards to interpret provisions in the declaration in a manner consistent with the Board's fundamental responsibility to conduct themselves fairly and in good faith toward all unit owners and occupants.

Thus, the Board's assessment as to whether any particular noise causes an annoyance or disturbance to another unit occupant should be both objective and reasonable. It should be based on whether the noise can reasonably and in general be considered an annoyance or disturbance to the comfort of other unit occupants, and not solely on whether it is in fact annoying to the unit owner lodging the complaint (although this might form part of the basis for taking action).

Considering the scenario set out above, in general noise that is generated within a multi-residence building by usual daily activities and lifestyles, such as walking and/or opening and closing of doors, should not ordinarily or reasonably be considered an annoyance and/or disruptive to others. It is not reasonable, or consistent with the considerations to be expected from a reasonably prudent person, to prohibit ordinary lifestyle and occupancy of a unit or to complain of the noises resulting therefrom.

Residents of multi-residence dwellings - which include virtually all condominium complexes - must accept that there will be a certain amount of such noises from their neighbours. Such noises, or any unit owner's particular sensitivity to them, will usually not form the basis for a reasonable legal claim against a neighbour.

It may be, as in the scenario described above, that the condominium building does not contain sufficient insulation and/or other noise barriers to prevent the transmission of noise from one unit to the other. However, while this circumstance might ethically impose a higher standard of mutual consideration upon the residents of those units, it should not be the basis on which the Board uses its enforcement powers under the Act to interfere with a unit owner's right to use his/her unit in any usual residential manner.

On the other hand, noises that are not simply incidental to residential usage should be considered by the Board to be an annoyance, nuisance and/or disruption and result in some sort of positive enforcement action. For example, if the Board makes an investigation of the complaint and discovers that the upper floor unit occupants were in fact making noise by wrestling in the common element hallways, this ought to be considered not to be a usual or appropriate use of the residence. Such noises would be considered a genuine annoyance or disturbance to the lower unit occupants in respect of which the Board should take action.

In this case, it is suggested that the following course of action be taken:

1. The property manager or a Board member should speak to the owner/ occupant of the unit from which the noise emanated. Alternatively, communication could be in writing. Such communication should explain the need for compliance with the declaration or rules of the condominium and, perhaps, about common neighbourly consideration. Such communication should clearly identify the problem and explain how it affects the other owners and occupants of the condominium, without using aggressive, demeaning or judgmental terms. It should also clearly request that such noises cease. Such communication may be made one or more times depending on the seriousness of the issue and responsive efforts of the offending unit owner or occupants.
2. If such communication fails to obtain compliance, a follow-up letter may be sent by the condominium's lawyer. This letter should mention that failure to comply may result in a court application or mediation/arbitration proceedings, depending on the issue in question. (Note that noisy conduct can, in certain extreme cases, be determined to constitute oppressive conduct justifying an application to the court pursuant to section 135 of the Act without first engaging the mediation and arbitration requirements of sections 132 and 134 of the Act.) It may be appropriate for this letter to warn the unit owner of the potential costs to the owner of such enforcement actions, including the risk that court-ordered costs may be deemed common expenses attributed to the unit that may be the subject of a lien if unpaid.
3. If all the foregoing fails to result in a cessation of the disturbance, then the Board may have no choice but to take steps to move to mediation/arbitration or court proceedings, depending on the issues and the requirements of the Act.

Although the foregoing discussion focuses particularly on dealing with noise, the same principles and procedures are applicable for almost any conflicts that might arise between neighbours on the basis of disturbing (or allegedly disturbing) conduct.

It is to be hoped that the majority of conflicts will never reach step 3 above. However, this will depend on the nature of the problem and the sense of community and reasonableness of the parties involved.

Motivational speaker, Jim Rohn, advises: no one can be reasonable and angry at the same time. Usually, reasonable people will acknowledge their role in making their community a successful and enjoyable place to live. When helped to recognize the effects of their actions, such people should be willing to modify their behavior for the benefit of the condominium community at large. The enforcement remedies set out in the Act are intended for those, hopefully rare, circumstances where the parties involved will not.

If the Board consistently seeks to handle conflicts in a fair, reasonable and community-centred manner, we think it likely that in most cases clear, unequivocal and reasonable oral or written notification under step 1 above should be sufficient to correct the problem and also strengthen and maintain the future peace of the community.