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About Condo

A COMMENT ON THE ALLOCATION OF COMMON EXPENSE OBLIGATIONS

As solicitors working for a number of condominium developers as well as managers and boards of several condominium corporations we often are required to explain how the allocation of the obligation to pay common expenses works.

As simple a concept as it really is, we have often encountered a particular pair of erroneous notions that have occasionally been quite difficult to correct. They are,

(a) that it is necessary, and

(b) that it is most fair

to allocate responsibility for contributing to the common expenses in proportion with unit size. This memo attempts to set out what is wrong with those two ideas.

FIRST THINGS

To help clarify this discussion, some preliminary explanations are in order.

First: what is a common expense?

The *Condominium Act, 1998* (the "Act") defines common expenses as

> *the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration.*

In short, any cost that the condominium must bear for the purposes of being what a condominium corporation is and doing what it must do, is a common expense.

It is useful to note that according to this definition common expenses can be defined in only two places: (1) the Act; and (2) the declaration. (The Act also permits the Court, in some circumstances, to impose additional common expenses.) Common expenses cannot be defined or established in rules or by-laws of the corporation (except where such is authorized under the Act or the declaration).

The second issue is: where does the money come from?

Common expenses are called "common" because they are the shared responsibility of all of the unit owners (just as "common element" is a shared part of the condominium property, and "common interest" defines the extent of an owner's interest in the common elements and assets of the corporation). Therefore, common expenses are paid by the unit owners.

Section 84 of the Act provides, as follows, that no owner is exempt from the requirement to pay his or her or its allocated share of the common expenses regardless of virtually any circumstances:

> *Common Expenses*
> *Contribution of owners*
>
> *84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.*
>
> *…*
>
> *No avoidance*
>
> *(3) An owner is not exempt from the obligation to contribute to the common expenses even if,*
>
> *(a) the owner has waived or abandoned the right to use the common elements or part of them;*
>
> *(b) the owner is making a claim against the corporation; or*
>
> *(c) the declaration, by-laws or rules restrict the owner from using the common elements or part of them.*

Finally: how does a unit owner know how much of the common expenses he or she or it is responsible to pay?

As indicated in section 84(1) of the Act, quoted above, owners are to pay the proportion of the common expenses that is specified in the declaration.

Section 7(2)(d) of the Act states that every declaration shall include:

> *a statement of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses.*

The regulations under the Act indicate that these proportions are to be set out in Schedule D.

Any regular (i.e., budgeted) or special assessment of common expenses is to be allocated to each of the unit owners in accordance with the proportions, expressed as percentages, in Schedule D.

The only exceptions to this are "additional common expenses" that are sometimes charged against a particular unit on the basis of special circumstances, such as where the condominium corporation performs repairs the unit owner has failed to do in a reasonable time under section 92 of the Act, or to reimburse the condominium's insurance deductible under section 105. However, for the purposes of this memo such additional common expenses are not relevant.

As it is now explained that:

a. the common expenses are all the expenses of the condominium corporation;
b. all unit owners are required to pay a portion of the common expenses; and
c. such portion is defined in the declaration, expressed as a percentage;

we can now examine more closely the suggestions that it is necessary and most fair to allocate common expenses obligations on the basis of unit size.

ON NECESSITY

While the practice might be somewhat typical (I am not certain that it is), there is nothing in the applicable law, in Ontario at least, that mandates the allocation of obligations to pay common expense contributions according to unit size.

At one time, this writer was taught that two relevant concepts were inviolate:

1. that every unit be allocated a share of the responsibility to pay common expenses; and

2. that the total of all such shares, when expressed as percentages, be equal to 100%.

Neither of these concepts refers in any way to a requirement to apportion responsibility for the common expenses in accordance with unit size.

Only the latter of these two concepts is expressly stated in the legislation. Section 5(5)(b) of Ont. Reg. 48/01 made under the Act states:

> *(5) Schedule D shall contain,*
>
> … *(b) a statement of the proportions, expressed in percentages totalling 100 per cent, allocated to the units, in which the owners are to contribute to the common expenses.*

The former concept is not ever defined in the legislation; however, to our knowledge, until recently it was never questioned.

Although the first concept still seems to this writer to be a reasonable rule of thumb for all cases, it was recently displaced by the decision of the Ontario Court of Appeal in *York Region Vacant Land Condominium Corp. No. 968 v. Schickedanz Bros. Limited* (2006 CanLII 32596 (ON C.A.)).

In that case, the Court upheld provisions of a declaration that effectively removed or at least delayed the obligation to pay any common expenses from undeveloped parcels of tied land in a common elements condominium corporation. The Court stated (underline emphasis added):

> *The purpose of* [subsection 84(3) of the Act] *is not to prevent a 0% allocation in the declaration, but rather to prevent a unit owner or a Potl owner in the context of a CECC from resiling from his or her obligation to contribute to common expenses as apportioned by the declaration.*

The Court further condoned "*the absence of any obligation* [for certain parcels or units to contribute to the common expenses] *pursuant to the declaration*."

Therefore, today it would seem to be that only one fundamental concept applies in all cases with respect to the allocation of common expenses: that 100% of them must somehow be covered.

Even without the decision of the Court of Appeal in *Schickedanz*, but all the more since that decision was published, there would appear to be no basis in law for the suggestion that it is necessary to allocate common expenses in proportion to unit size, or, indeed, in accordance to any other rationale.

ON FAIRNESS

If the foregoing quotations from *Schickedanz* were not enough already to dispel the general illusion that common expenses must be allocated fairly, the following quotation should clinch it. The Court of Appeal in *Schickedanz* went on to say:

> *…we recognize that the bifurcated formula* [set out in the declaration created by Schickedanz, exempting undeveloped POTLs from contributing to the common expenses] *clearly favoured the interests of Schickedanz at the expense of the unit holders, but in our view, it does not necessarily follow that this conduct was either oppressive or highly prejudicial. … It is not oppressive for a developer declarant to register and implement a properly disclosed declaration so long as it is in compliance with the Act and its regulations.*

In short: it doesn't matter if the declarant's allocation of common expense obligations is fair, as long as it complies technically with the Act. This principle has always been the case (there is nothing else in law that contradicts it); it has simply not always been recognized or so baldly stated.

Having said this, in our view it is good practice for developers of condominiums to design common expense allocations in a manner that is fair and reasonable, and we advise all of our developer clients to do so. Indeed, certain case law would suggest that a developer who does not do so may be in breach of an obligation to act in good faith in relation to the exercise of its rights and privileges under the Act; but, by and large, the basis for doing so is just that it makes good business sense.

But the question in this article is different: we are simply asking whether allocation in proportion to unit size is always the most fair and reasonable approach. In this writer's view, it clearly is not.

There are several cases in which it should be obvious that unit size has no direct or reasonable bearing on how much of the common expenses an owner should pay.

One example is that of a “whole lot” or “lot line” condominium. In such a development, each owner might be responsible for his or her unit’s building exterior and yard areas and all utilities. The common elements and services will typically include such things as the shared roadway, external lighting and garbage pick-up, all of which all owners share equally. It will therefore likely be most fair if the unit owners each pay an equal proportion of the common expenses regardless of whether the units themselves are of various sizes.

Likewise, for several common element condominium corporations, equal allocations not related to the size of the parcel of tied land makes eminent sense.

In other cases, allocations may be unequal but based on such things as unit type or design (such as condominiums including both high-rise and townhome style units, or where some but not all of the units are in a heritage-designated building that requires special maintenance), or services or facilities available to some unit owners but not to others (i.e., box seats at the Rogers Centre or use of an elevator), rather than unit size

All these and other similar factors must be considered in order to determine whether the allocation of responsibility for the common expenses in a particular case is fair. There is no guarantee that there is any one standard or practice that will be right in and for all cases.

In the end, it is our view that, as it pertains to the allocation of responsibility for the common expenses of a condominium corporation, it is simply incorrect as to the law and unwise as to business practice to attempt to establish a standard rule as the only one that should be done. However, even if this view turns out to be wrong, it is still very clear that the allocation of common expense contributions in proportion to unit size is neither necessary under the law nor in all cases a fair practice.

Michael H. Clifton (July 2007)