PUBLICATION

Allocating Expenses in Mixed-Use Condominium Developments

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As our population in Alberta grows, our cities change. There comes a point where cities stop growing out and start growing up. Dense urban centres are commonly associated with neighbourhoods that support a variety of uses and urban planners will generally say that this is a good thing. Having neighbourhoods with access to several services with a variety of different sorts of residences and businesses generally leads to more vibrant communities as well as more efficient use of space. Increasingly, such neighbourhoods often lead to residences and businesses being built literally on top of one another in the form of mixed-use commercial and residential condominiums.

In mixed-use properties, one of the complicating factors is how to allocate fees. Most often there are certain expenses which can be directly attributable to either the residential or commercial owners. Examples might be snow removal for a plaza in front of the commercial entrances, a more frequent window cleaning contract for the commercial owners, or the cleaning of hallways only accessible by the residential owners.

Quite often a provision is made in the Bylaws stating that such expenses be charged as fees only to the owners who benefit. Although in a purely residential or purely commercial condominium fees are often allocated strictly by unit factor, in a mixed-use development that is not often the case.

This all brings me to the recent case note in Ontario entitled, *White Snow* and *Sunshine Holdings Inc. The Metropolitan Toronto Condominium Corp. No. 561*. In this case the owner of the only commercial unit in a mixed-use development brought an application to declare a portion of the Bylaws (or "Declaration" in Ontario) to be not in compliance with the *Ontario Condominium Act*. The Declaration in question stated that only the residential owners could use an extensive pool, gymnasium and squash court facility within the property. The commercial owner argued, "If I'm paying fees for it, why can't I use it?"

Although it appears that the commercial owner paid less per square foot in condo fees than the residential owners, it doesn't appear that expenses specifically attributable to the recreational facilities were billed exclusively to the residential owners. The Condominium Corporation merely collected all fees and distributed them to pay expenses regardless of whether those fees came from the residential owners or the commercial owners.

In the end, the Court dismissed the application based on several considerations, including the particulars of the

Ontario Condominium Act as well as a Toronto municipal Bylaw. It is not certain the same decision would be reached in other provinces, and even if such a scheme were permissible, it is certainly not a best practice. As can be seen in this case, such situations can lead to uncertainty and litigation unless it is made clear which expenses are chargeable to which owners. If one set of owners believes that they are being charged for things for which they receive no benefit, it is reasonable to think they might protest.

The take away is that Boards and property managers of Condominium Corporations should be very clear as to how these expenses are to be addressed. Like most condominium law issues, the initial step involves an examination of the Bylaws. If there is a Bylaw which addresses the allocation of expenses, make sure it is being properly followed. If a clear allocation is not made in the Bylaws, consider having them amended to better reflect the particulars of the property. Most importantly, be clear and transparent. Mixed-use developments can be great places to live and work when issues like this have been addressed.

For further information please contact any member of our Condominium Law Group.