



SPRING CLEANING

The winter thaw has come to an end and spring has sprung upon us! In addition to the first sightings of spring flowers, an issue common to nearly all condominium corporations begins to bloom at this time of year: cleaning up the common elements. The question is, who is responsible, the corporation, the owner or perhaps both?

Issues with respect to the maintenance of common areas may be discovered during the annual spring-walk-around, or by a nosy neighbour's complaint. Whichever way the problem is discovered what typically follows is a friendly reminder letter, or email, sent from the corporation's property manager to the owner asking them to take care of the problem. But what happens when the owner ignores the request or outright refuses to comply?

STEP ONE: Determine how the area is designated: exclusive use common element, ordinary common element or whether it forms part of the unit, and identify the owner's obligations with respect to the area

According to sections 90 and 91 of the *Condominium Act, 1998* (the "**Act**"), the corporation shall maintain the common elements and each owner shall maintain the owner's unit *unless* the declaration alters the corporation's obligation by providing that each owner shall maintain those parts of the common elements of which the owner has exclusive use. If we are dealing with a front yard issue, this means that unless the corporation's declaration contains a clause that states:

"Each owner shall be responsible for the care and maintenance of all flower gardens, ornamental shrubbery and lawn within any exclusive use areas adjoining the unit"

or some other more general obligation to maintain the area, the corporation would likely be responsible for the maintenance of the front yard. To determine whether there are exclusive use common element areas look at Schedule "F" of the declaration, which contains a specification of all parts of the common elements that are to be used by the owners of one or more designated units only, and not by all the owners, or indicates that there are no exclusive use areas within the corporation.

After careful review of the corporation's declaration you determine that the area appears to be classified as an exclusive use common element, and if it is, the owner is responsible for maintaining it. However, which specific part of the area (or in our example, the front yard) is designated as being exclusive use common element area?

STEP TWO: Review the description plans to determine the boundaries of the unit to ascertain exactly which part of the area is designated as exclusive use common element area

A description plan contains, among other things, a drawing of the boundaries of each unit by reference to the buildings or other monuments. Review the declaration in conjunction with the description, as Schedule "F" to the declaration will typically include clauses that help the reader understand the various sections of the description. In our example, Schedule "F" could include the following clause:

1. Each owner of a unit shall have the exclusive use of:
 - a. the front yard and covered porch designated by being numbered the same as the unit number followed by the letter "A" indicated on Sheet 2 of Part 1 of the description;

STEP THREE: Put all the facts together

The declaration provides that owners are responsible for the care and maintenance of all flower gardens, ornamental shrubbery and lawn within any exclusive use areas adjoining the unit. According to the declaration and description, the front yard adjoining our owner's unit is designated as exclusive use common element area.

Conclusion: the owner is responsible for the care and maintenance of their front yard and since they have breached the corporation's declaration (and quite possibly the rules as well), the corporation may take steps to force compliance by the owner.

STEP FOUR: Ask for compliance – The paper trail!

You should first review the corporation's declaration, bylaws and rules to determine if specific protocol must be followed in the event of non-compliance. Make sure to follow any such protocol precisely, (e.g. some condominium rules require a series of warnings be issued before the matter can be turned over to the corporation's lawyers for enforcement). If the corporation does not have specific protocol and if the situation permits (it is not overly dangerous and immediate attention is not required) we recommend a "three strikes and your out!" approach be adopted.

Strike One - The initial "friendly" reminder letter from the property manager to the owner can be considered the first strike but we suggest the first strike be considered a second more sternly written letter from the corporation which should:

- be courteous but firm in nature and be sent directly from the corporation;
- clearly identify the problem and the section(s) of the Act, declaration and/or rule that are being breached;
- provide a specific timeline to remedy the breach; and
- clearly state that the corporation may add any costs it incurs, including contractors charges and legal costs incurred in the process of obtaining compliance to the common expenses for the unit and that the corporation may impose a deadline by which those costs are received from the owner.

While this process is going on it is essential that evidence of the breach be gathered, including:

- LOTS of pictures from different angles;
- noting patterns (same issue occurred last year);
- inspection results by board and property manager;
- complaints from other owners in the owners file; and

- previous compliance letters.

If it becomes necessary to send the matter to the corporation's lawyer all of this information should be sent to them with your request for their help.

The above steps would normally apply to any exclusive use common element area in a condominium, including storage and parking spaces, balconies, porches, and rear yards. If the area in question is not an exclusive use area what then?

In some cases the declaration may still impose maintenance and repair obligations for ordinary common element areas on an owner. If that is the case the same procedures outlined in this article would apply. If the area is part of the unit, the owner would in almost every case be fully responsible for maintaining the area and the corporation is entitled to insist on compliance.

If it is not clear what responsibilities the owner may have it would be prudent for the corporation to obtain an interpretation of the declaration and description plans from the corporation's lawyer before seeking compliance. This would not only give the board of directors a guide for dealing with all of the owners on this issue but also avoid what might be a potentially embarrassing situation if it turned out the owners had no obligation to maintain the area in question.

Whether or not the matter is referred to the lawyer it is important to take action according to the corporation's declaration, bylaws and rules and follow reasoned and civilized steps. Always proceed on the basis that you may end up in front of a Judge or an Arbitrator who may not look favourably upon a corporation that appears to be acting in a high handed or biased manner. You will get better results than if you make impulsive and unsupported decisions, contrary to the governing documents.

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