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Editor:
Andrea Lusk

Supers' Units Assessment Victory

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI



The Assessment Review Board ruled on March 15, 2013 that 40 participating superintendents' units should each be assessed for taxation at \$9 for their 2011 and 2012 tax years. That precedent has industry-wide implications.

Millions of dollars of assessed value have been eliminated each year for years to come. The \$9 assessed value is a signal that no municipal tax bill should be issued.

In addition, the ARB's analysis with respect to the preferred "service easement" argument was worded with the intent to extend to other common amenity service units ("CASUs") such as a guest, visitor parking, mechanical, gate house, recreational or other such units owned by a condominium which provide amenities or services to its residents.

TSCC 1498 et al. v. MPAC was heard on September 17th and 18th, 2012. GMA's 43-page written brief and oral argument explained over 100 legal concepts to rationalize seven separate grounds for appeal, supported by our 14 legal precedent cases and 200 pages in TSCC 1498's Statement of Facts. In its 35-page Decision, the ARB concluded that supers' units should receive nominal assessment for three separate reasons.

Luckily, the ARB adopted our submission that s. 12 of the *Condo Act*

"provides the most elegant solution." The ARB agreed with our analysis of the dictionary meanings attributed to the word "service" and the relevant case law in the context of a superintendent's typical services at a condominium. Section 9 of the *Assessment Act* allows an exemption or reduction in the assessment where a "servient tenement" (such as a super's unit) is subject to an easement which deems its assessed current value to be transferred to the dominant tenements (each of the individually-owned residential units). The ARB also accepted our submissions that the assessed value of the supers' units had inherently been transferred by those easements and had already been taken into account in the individually-owned residential units' assessed values.



The ARB recognized the prior status of such CASUs as common elements in earlier days before developers began to squeeze more dollars from those spaces by converting them into units sold to their

condominiums. The ARB considered the practical effect of interpreting such a service easement as being for the benefit of common owners in accordance with the ARB's prior *Schickedanz* decision. The ARB's analysis incorporated the question, "Do the other types of 'commonly owned amenity service units' such as guest units, parking units, recreational units, mechanical units and even a putting green unit, provide service to the residential units? A broad interpretation of the word 'service' suggests that the answer is, they do."

As an alternative solution, the ARB concluded after extensive analysis that the market value of the supers' units was minimal and that the value had already inherently been transferred to owners' residential units.

The ARB also concluded that it was inequitable to assess Super's units differently than guest units. Last year, GMA had convinced MPAC to reduce the assessment of over 200 of GMA's condo clients' guest and visitor parking units to an assessment of \$9 each, based upon GMA's unique Request for Reconsideration rationales.

We will not know until April 16th whether MPAC will agree to abide by that decision or whether it may decide to appeal.

If your condo's CASUs are assessed for taxation for an amount in excess of \$9, we will be pleased to seek nominal assessment for such units using GMA's unique Request for Reconsideration arguments.

Committee Criteria

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI



Has your corporation specified the criteria governing its committees and members? Various provisions can be established in a *Committee Criteria* document to avoid problems by addressing topics such as the committee's scope, reporting obligations and confidentiality requirements. Your board of directors can pre-ordain the means to choose and remove committee members, their preferred characteristics, duties, and obligations to comply with a *Committee Members' Code of Ethics*.

Condominiums often establish specific -purpose or on-going committees to address topics falling within the mandate of a House Committee, Gardening Committee, By-law & Rules Committee, a Renovation Committee and for other specified purposes. Often those committees are established on a casual basis without defining a number of criteria. That can lead to a range of problems.

Committees can become the breeding ground and a stepping stone enabling condo commandos to launch campaigns booting-out existing directors and taking control of the board – but committees can also identify creative team players who the board may wish to promote as future directorial candidates. Committees can also provide an excellent means to address specific issues, while delegating tasks from the board to a broader spectrum of owners who can participate in improving the community. Committee members can investigate details and recommend a range of solutions to widen the board's perspectives and enable it to reassure unit owners that their concerns were duly considered.

A well-drafted set of *Committee Criteria* can follow a standardized template, with customized adjustments to suit the circumstances. The board should authorize creation or continuance of the committee by a board resolution. Typically, committees would be re-

quired to report only to the board in an advisory capacity. The *Committee Criteria* can point out that while the committee's work is appreciated and each member's input is valued, in the end, the board has to take into consideration a range of various governing factors which may result in the committee's recommendations being overruled or amended by the board. A committee can be allocated a defined budget to fund the cost to hold meetings and carry out specified functions, subject to a requirement to forward budget requests to the board in advance of its annual budgeting process.

The board should specifically reserve the right to establish the number, term and qualifications of committee members, subject to the board's discretion to increase or reduce the number of members or to appoint, remove, replace or re-appoint any specific member. Our precedent form of *Committee Criteria* and its *Checklist Rating Scale* rates a number of preferred characteristics which boards can consider when appointing committee members. Fortunately, a condo board can exercise the discretion to establish picky criteria when assessing the profile of potential committee members. The *Committee Criteria* also enumerates the reasons for disqualification of a committee member, with the result that a board can always justify getting rid of a bad apple.

Members can also be asked to sign and comply with our precedent form of *Committee Members' Code of Ethics*, which also refers to our precedent *Owner's Code of Ethics*. Those criteria not only assist in good governance and best practices, but are also intended to minimize the abuses which some candidates tend to use when engaging in proxy campaigns and defamatory statements in an attempt to throw out the existing directors.

Committees usually lack specific governing provisions which are applicable to board meetings. Our *Committee Criteria* precedent addresses the appointment and duties of the Chair, the calling and holding of meetings, notice and quorum,

adjournment and the summary recording of minutes pursuant to an agenda. Provisions can govern the manner of undertaking the affairs of the committee on a friendly, businesslike and efficient basis without undue disruptions. Members may have differing, strongly-held views, but after discussion, a majority consensus is expected to result in recommendations to the board which benefit the best interests of the corporation and its owners under the circumstances. Members should be obligated to refrain from expressing disparaging remarks about other committee members holding opposing views. Members should also respect other confidential discussions and affairs of the committee which are intended to be reported only to the board.

For all their efforts, members should receive public recognition. They should also be reassured that they are protected from liability, even though they are not subject to the rights, duties, powers and liabilities applicable to elected directors. The board should pass a resolution to appoint them as committee officers, protected from personal liability by the indemnification provision contained in the corporation's general by-law. The property manager should inform the corporation's insurer that the board has authorized specified committees and that all members of those committees have been designated as committee officers intended to be protected by the Corporation's officers' and directors' errors and omissions policy.

GMA's *Committee Criteria*, *Checklist Rating Scale*, *Committee Members' Code of Ethics* and *Owners' Code of Ethics* can be ordered from GMA upon request.



Condo slammed for lax rule enforcement

Syed Ali Ahmed, B.Math, B.A., J.D.



In a rare instance, an Ontario Court has ordered a condominium corporation to pay compensation to an owner for acting in a way that was unfairly prejudicial to the owner and unfairly disregarded the owner's interests.

The case, *Dyke v. MTCC 972*, 2013 ONSC 463, was an application by an owner for an "oppression remedy" under section 135 of the *Condominium Act, 1998* (the "Act"), for the condominium corporation's failure to enforce compliance with its noise rule.

Over a period of many months in 2011, the owner, Elizabeth Dyke, complained several times to the property manager about excessive noise from the unit above hers, which was being used as a professional dance studio in contravention of the condominium declaration, by-laws and rules. Security reports confirmed that the noise levels from the unit above were too high. The unit also did not have area rugs on the floor as recommended by an earlier expert report on noise transmission from the unit.

Despite Dyke's complaints, MTCC 972 and the property manager did not write a letter to the offending unit requiring an end to the noise-making. Dyke finally wrote to MTCC 972 indicating that she would hold the corporation legally responsible if they did not take action to enforce the condominium rules.

Instead of taking action to enforce its noise rule against the offending unit, the condominium corporation and property management began to target Dyke through a series of vindictive actions, including:

- They charged Dyke an excessive amount of \$50 for giving her copies of the condominium by-laws and rules when the general notice to all owners provided for only a \$5 cost.
- They sent Dyke a notice to remove her two dogs over a minor incident in which one of the dogs had nipped at the finger of a stranger who had unexpectedly reached out to pet the dog.
- Dyke had been using a second unit she owned in the building for her legal practice for 17 years, without meeting clients there or otherwise interfering with other residents' use of their units or the common elements. MTCC 972 demanded that Dyke stop the unit's use for business activity in a residential condominium, while taking no similar action to stop the professional dance studio operating in the unit above.
- One of the corporation's directors left a note on Dyke's door falsely complaining that her dogs had been making noise and disturbing the neighbours. When Dyke asked him about the note, the director behaved in an abusive manner.

The noise and related stress ultimately led Dyke and her daughter to move out of her unit. MTCC 972 still failed to take any action to abate the noise so that they could move back in.

The Court found that, by failing to enforce its rules, MTCC 972 had acted in a manner that unfairly disregarded Dyke's interests, and that the "small harassments" towards Dyke amounted to unfairly prejudicial conduct under s. 135.

The Court ordered MTCC 972 "to take all reasonable steps to ensure that its by-laws and rules... are complied with, and that [Dyke] regain quiet enjoyment of her units", including notifying the owners or tenants of the unit above to install adequate additional floor covering. The Court ordered MTCC 972 to pay over \$40,000 to Dyke for damages and expenses incurred in moving out of her unit, plus \$19,500 in costs for the court application. The issue of compensation for pain and suffering, mental anguish and loss of income and comfort will be decided later.

The Court did commend MTCC 972 for changing property managers after the application was brought and noted the new property manager's promise to rectify the situation. The Court likely sensed that the situation had become worse than it should have been because of the bad attitude and lack of professionalism of the board and property manager.

This case is a reminder to condominium corporations of their duty to act quickly, fairly and effectively in taking all reasonable steps to ensure compliance with the Act, the declaration, the by-laws and the rules. Boards and property managers should take seriously complaints of non-compliance, regardless of who makes the complaint, especially if the issue is interfering with an owner's quiet enjoyment of their unit or the common elements. After proper investigation, the board should make an independent and fair determination of whether a complaint is warranted. If so, the condominium corporation should take all appropriate and reasonable steps to ensure compliance.

As the Court stated, the condominium corporation "has a responsibility to enforce its rules in a balanced way so as to ensure that all of the owners and tenants can enjoy their respective units." Failure to do so can be costly for the parties involved and harmful to the condominium's reputation and community spirit.



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